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No. 280.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING COMPANY,
Plaintiff in Error,
vs.
ALTOONA QUICKSILVER MINING COMPANY,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ in Error to the Circuit Court of the United States for the Northern District of California.

INDEX.

In the United States Circuit Court in and for the Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY,
Defendant.
} At Law.

Complaint.

The said plaintiff, by Messrs. Cross, Hall, Ford & Kelly, its attorneys, complains of the said defendant, and for cause of complaint alleges:

I.

That the said plaintiff is, and for more than twenty years last past has been. a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California.

II.

That the said defendant, Integral Quicksilver Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, and having its principal place of business at the city of New York, in the State of New York.

III.

That the place of residence of said plaintiff is in the State of California, and that the place of residence of the said defendant is outside of the State of California, and within the United States.

IV.

That the said plaintiff is the owner of, and entitled to the possession of, and prior to the wrongful acts of the defendant hereinafter alleged had been for more than fifteen years in the notorious, peaceable, continuous, adverse possession of, those two certain ditches, and the water rights appurtenant thereto (and during all of said time paid all of the taxes, State, county, and municipal assessed thereon) described as follows:

1. The Altoona Ditch, sometimes called the Crow Creek Ditch, a ditch taking water out of Crow Creek, in the county of Trinity, State of California, and running and extending thence, by the way of Wiltz Ravine (and also taking water therefrom), to the Altoona Quicksilver Mines, in said Trinity County.

2. The Boston Ditch, also taking water from said Crow Creek, and running thence across Wiltz Ravine (and taking the water therefrom), and extending thence and therefrom to the said Altoona Quicksilver Mines.

3. The right to receive from said Crow Creek and said Wiltz Ravine, and to divert therefrom, by means of said ditches, all of the water flowing in said Crow Creek and said Wiltz Ravine, not exceeding the capacity of said Altoona Ditch and Boston Ditch, to receive and convey

the same to the said Altoona Quicksilver Mines. Said water rights being of the extent of five hundred miners' inches of running water, measured under a four-inch pressure, and being the first and prior right to divert waters from said Crow Creek and Wiltz Ravine.

V.

That, for more than five years, viz: for about fifteen years next preceding the wrongful acts of the defendant hereinafter alleged, the said plaintiff and its grantors, have been in the notorious, continuous, exclusive, adverse possession of the said Altoona and Boston ditches, and of the said water right, using and appropriating the same to its own use and for its own purpose, and claiming the same adversely to all the world, and during all of said time has paid all of the taxes, State, county, and municipal, which have been levied and assessed thereon.

VI.

That, whilst said ditches and water rights were so in the possession of the said plaintiff, and on or about the 29th day of August 1893, the said defendant, the Integral Quicksilver Mining Company, by its officers, agents, and employees, wrongfully and unlawfully, and against the will of said plaintiff, and without any right whatever, entered into and upon the said Crow Creek and Wiltz Ravine and said Boston Ditch, and took possession of said Boston Ditch, and in, and through it, diverted and turned all of the water coming to the head of said Boston Ditch, and to said Boston Ditch where it crosses said Wiltz Ravine, and turned all of the water away

from said Altoona Ditch, and conducted and conveyed the same away from the plaintiff's mines and reduction works, where the said plaintiff was accustomed to use and had use for the same, and ousted and ejected the said plaintiff from the said Boston Ditch and the said water rights, and deprived the said plaintiff of the possession thereof, and appropriated the same to its, the said defendant's own use, and has ever since continued wrongfully and unlawfully to withhold the possession of the said Boston Ditch, and the said waters and water rights from the said plaintiff, and without right, and wrongfully, the said defendant still holds and withholds from the plaintiff the possession of the said Boston Ditch, and of the said waters and water rights to the injury of said plaintiff in the sum of five thousand dollars.

VII.

That the value of said Boston Ditch and of the said waters and water rights so wrongfully taken possession of and withheld by said defendant from said plaintiff is more than two thousand dollars.

VIII.

That the said ditches, waters and water rights, and Crow Creek and Waltz Ravine, and Altoona Quicksilver Mines, are all situated in the county of Trinity, State of California, and within the said Northern District of California.

Wherefore, the said plaintiff prays judgment for the possession of said Boston Ditch, and of said water rights,

and for damages in the sum of five thousand dollars, and for its costs of suit.

CROSS, HALL, FORD & KELLY, and
NAPHTALY, FRIEDENRICH & ACKERMAN,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco, } ss.

Charles Allenberg, being first duly sworn according to law, deposes and says: That he is the secretary of the said plaintiff, the Altoona Quicksilver Mining Company, a corporation; that he has heard the foregoing Complaint read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to them he believes it to be true.

Charles Allenberg.

Subscribed and sworn to before me this 4th day of December, A. D. 1893.

[seal] L. Meininger,
Notary Public.

[Endorsed]: Filed December 4, 1893. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY, Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY, Defendant.
} At Law.

Answer.

Comes now defendant, the Integral Mining Company, and for answer to the Complaint of plaintiff herein alleges, admits, and denies as follows:

I.

Defendant admits paragraph I of said Complaint.

II.

Defendant admits paragraph II of said Complaint.

III.

Defendant admits paragraph III of said Complaint.

IV.

Defendant denies, upon his information and belief, that plaintiff is, or that it was at any of the times in Complaint mentioned, or ever was, the owner of or entitled to the possession of the Altoona Ditch, sometimes called the Crow Creek Ditch, in the county of Trinity, State of

California, running and extending thence by way of the Wiltz Ravine to the Altoona Quicksilver Mines in Trinity County, or taking water therefrom, or that plaintiff is now or ever was such owner of any part or portion or parcel thereof.

Denies upon like information and belief that plaintiff was or has been for more than fifteen years, or for any time whatever prior to the commencement of this action, in either the notorious, peaceable, continuous, or adverse possession of said Altoona Ditch, as in Complaint described, or any part or portion thereof, or that during all or any of said times plaintiff has paid all or any of the taxes, either State, county, or municipal, assessed upon said Altoona Ditch aforesaid.

V.

Defendant denies that plaintiff is, or that it was at any of the times in the Complaint mentioned, or that it ever was, the owner of or entitled to the possession of the Boston Ditch, taking water from said Crow Creek, and running thence across Wiltz Ravine, and extending thence and therefrom to the Altoona Quicksilver Mines, and taking the water therefrom to said mines, as in Complaint described, or that plaintiff is now or ever was such owner of any part, portion, or parcel of said ditch as therein described.

Denies that plaintiff is, was, or has been for more than fifteen years, or for any time prior to the commencement of this action, in either the notorious, peaceable, continuous, or adverse possession of said Boston Ditch, as in Complaint mentioned and described, or any part or

portion thereof, or that during all or any of said times plaintiff was paid all or any of the taxes, either State, county, or municipal, assessed upon Boston Ditch aforesaid.

VI.

Defendant denies that plaintiff is the owner of or entitled to the right to receive from Crow Creek or from Wiltz Ravine, or to divert therefrom by means of the ditches in the Complaint mentioned, or by means of either of them, all or any of the waters flowing in said Crow Creek or in said Wiltz Ravine, not exceeding the capacity of said Altoona Ditch and Boston Ditch, or that he is entitled to any such right whatever to take any of said waters, or to receive or convey the same to said Altoona Quicksilver Mines.

Defendant denies upon its information and belief that plaintiff has any water rights in or to the waters of said Crow Creek or said Wiltz Ravine to the extent of five hundred miners' inches, running water measure under a four-inch pressure, or that it has any such right whatever. And denies that said alleged right of plaintiff is the first or prior right to divert waters from said Crow Creek and Wiltz Ravine, or that plaintiff has any such right to divert any of such waters.

VII.

Defendant denies that plaintiff or its grantors, or either of them, have been in either the notorious, continuous, exclusive, or adverse possession of said Altoona or Boston ditches for more than five years next preceding the alleged acts of said defendant as in Complaint al-

leged, or that it or its grantors had or has been in such possession for fifteen or for any number of years whatever, or that it or its grantors has ever been in such or any possession of the water rights alleged in Complaint to be appurtenant to said ditches, or to either of them, for five or for fifteen years, or for any time whatever. And denies that during all or any of said time aforesaid plaintiff has paid all or any of the taxes, State, county, or municipal, that have been levied or assessed upon or against said property.

Denied that plaintiff has been in such possession of said water rights, or that it has been using or appropriating said water rights for its own use and purposes, or claiming the same adversely to all of the world during said time aforesaid, or during any part or portion thereof, or that plaintiff has at any of said times, or during any of the times in Complaint mentioned, paid any of the taxes, State, county, or municipal, which have been levied or assessed upon said property.

VIII.

Defendant denies that while the said ditches in the Complaint described were in the possession of plaintiff, or on or about the 29th day of August, A. D. 1893, or at any other time, the defendant, the Integral Quicksilver Mining Company, by any of its officers, agents, or employees, either wrongfully or unlawfully or against the will of plaintiff, or without any right whatever, or that they ever or at all, entered into, in, or upon said Crow Creek and Wiltz Ravine and took possession of said Boston Ditch, or that defendant ever took possession of said

Boston Ditch at all except as herein stated. Denies that they turned all of the water coming down to the head of said Boston Ditch, or to said Boston Ditch where it crosses Wiltz Ravine, or that they turned all or any of the water away from said Altoona Ditch, or that they conducted the same away from plaintiff's mines or reduction works, except as herein stated. Denies that plaintiff or its grantors were accustom to use or had used any of the waters of Crow Creek or Wiltz Ravine that flowed through said Boston Ditch for any mines or reduction works, or for any other purpose, for more than twelve years next before the commencement of this action, if in fact plaintiff ever did use any of such waters. Denies that defendant ousted or ejected plaintiff from said Boston Ditch or from the possession thereof, or deprived it of the possession thereof for the reason that plaintiff was not and has not been in the possession of said ditch or of any of the water rights appurtenant thereto or connected therewith for more than twelve years last past.

Defendant admits that it has appropriated the waters of said Crow Creek and Wiltz Ravine that flow through said Boston Ditch to its own use, and that it now does so and was so doing at the time of the commencement of this suit, and alleges that it had done so for more than five years next before the commencement of this action, but denies that it does so without right or wrongfully or unlawfully. Admits that defendant still holds and withholds from the plaintiff the possession of the said Boston Ditch and of the water rights connected therewith, but denies that they withhold any of the other water rights

in Complaint mentioned from plaintiff or from any other person.

Denies that plaintiff is or was, or has been, injured by an holding or withholding of any ditch or water rights from it by defendant in the sum of five thousand dollars, or in any sum or amount whatever.

IX.

Defendant admits that the value of said Boston Ditch and of the water and water rights is two thousand dollars, but denies that the same were wrongfully taken possession of by or withheld by defendant from plaintiff.

X.

And for a further answer herein defendant alleges: that defendant and its grantors have been engaged in the business of mining and retorting quicksilver in the county of Trinity, State of California, for more than ten years last past, next before the commencement of this suit, and defendant further alleges upon its information and belief that long prior to the year A. D. 1880 said Boston Ditch and water rights connected therewith as in the Complaint described were used in connection with the operation of certain mining claims situated in Trinity County, State of California, and said water was diverted from said streams and carried to said mines and mining claims by means of said Boston Ditch, and said water, to the amount of two hundred and fifty miners' inches, was so diverted, appropriated and used in and about said mines and mining claims. And defendant further avers upon its information and belief that for two years, or thereabouts, prior to the year A. D. 1880, to wit, in the year 1878, said

mining claims, said Boston Ditch, and said water and water rights were abandoned, and said water ceased to flow through said ditch at the head thereof, and the said ditch, dams, and everything connected therewith were permitted to go to ruin and decay, and said ditch and said water ceased to be used for any useful or beneficial purpose whatever. That while said ditch and said water and said water rights were so abandoned and were not being used for any purpose whatever, defendant, its grantors and predecessors in interest, entered into and upon said ditch, repaired the same, and appropriated the water of said streams, Crow Creek and Wiltz Ravine, to the amount of two hundred and fifty miners' inches, to the full capacity of said ditch, and defendant, its grantors and predecessors in interest, have thence hitherto up to this date, and up to the date of the commencement of this action, have been in the open, notorious, peaceable, continuous, and uninterrupted possession of said Boston Ditch, and the water and water rights connected therewith, as herein described, and have ever since said time been using said ditch, water, and water rights, under claim of right and title thereto, against the world, for useful and beneficial purposes, to wit, in the running and retorting of quicksilver, and that defendant, its grantors and predecessors in interest, have paid all the taxes, State, county, or municipal, that have been levied or assessed upon said property or upon any part or portion thereof.

And for a further and separate answer herein defendant alleges:

I.

That defendant is the owner of and entitled to the possession of said Boston Ditch, and said water and water rights appurtenant thereto and connected therewith, to wit, 250 miners' inches of the waters of Crow Creek and Wiltz Ravine to the full capacity of said Boston Ditch, and that defendant, its grantors and predecessors in interest, have been in open, notorious, peaceable, continued, exclusive and uninterrupted possession of said Boston Ditch, and the water and water rights connected therewith, to wit, the waters of Crow Creek and of Wiltz Ravine to the full capacity of said ditch, to wi t: two hundred and fifty miners' inches thereof flowing under a four-inch pressure, and have appropriated and used the same under claim of right and title thereto exclusive of any other right, to wit, for the purpose of mining, for more than five years next before the commencement of this action, and have ever since said time paid all the taxes State, county or municipal that have been levied upon said property.

And for further and separate answer defendant alleges that long prior to the commencement of this action defendant, its grantors and predecessors in interest, posted in a conspicuous place upon said Crow Creek, to wit, at the head of said Boston Ditch, and at the place where said head of said ditch intersects the bank of said Crow Creek, a certain notice in writing, stating:

"WATER LOCATION.

"Notice is hereby given that the undersigned claims "the water flowing in this stream (Crow Creek) to the

" extent of two hundred and fifty (250) inches, measured " under a four-inch pressure.

" The purpose for which I claim said water is for " mining, milling, and domestic purposes on Cinnabar " Mountain between this notice and the confluence of the " water of the east fork of Trinity River and the north " fork of the east fork Trinity River.

" I intend to divert the water by means of a dam " across Crow Creek, about three hundred feet from a " lake and in a ditch cut two feet wide on the bottom, " three feet wide on top, and two feet in depth, on a " grade of one-half of one inch to the rod in length of " ditch.

" I also claim the water of the Wilt Gulch at the point " where this ditch line crosses said Wilt Gulch, to keep " up the head of water to the full head of two hundred " and fifty inches in said ditch at this point. The said " water to be used for the same purposes and at the same " places as aforesaid stated in the claim of the water " from Crow Creek.

" Located on the ground this 2nd day of May, 1892.

" Alexander McCaw.

" Witness location:

" Louis N. Girard."

That at the time of the posting of said notice no other person, persons, or corporations had posted any notice claiming the right to appropriate any of the waters of said Crow Creek or Wiltz Ravine under the provisions of title VIII of the Civil Code of the State of California. That thereafter, to wit, on the 3rd day of May, A. D. 1892,

the said defendant, its grantors and predecessors in interest, caused said notice to be recorded in the records of Trinity County, State of California, in Book No. 1 of Water Notices, at page 236.

And that ever since the posting and recording of said notice, defendant, its grantors and predecessors in interest, have continued to use the water of said streams to the full capacity of said Boston Ditch, to wit, to the amount of two hundred and fifty miners' inches under a four inch pressure, for useful and beneficial purposes, to wit, for the purpose of mining, retorting, and refining quicksilver in the State of California.

And for a further and separate answer herein defendant alleges that plaintiff's alleged cause of action is barred by the provisions of section 318 of the Code of Civil Procedure of the State of California.

And for a further and separate defense herein defendant alleges that plaintiff's alleged cause of action is barred by the provisions of section 319 of the Code of Civil Procedure of the State of California.

And for a further answer herein defendant alleges that plaintiff's alleged cause of action is barred by the provisions of section 325 of the Code of Civil Procedure of the State of California, and by the provisions of subdivisions "first" and "second" thereof.

And for a further and separate answer herein defendant alleges that plaintiff's alleged cause of action is barred by the provisions of subdivision "2" of section 338 of the Code of Civil Procedure of the State of California.

And for a further and separate answer herein defend-

ant alleges that plaintiff's alleged cause of action is barred by the provisions of section 323 of the Code of Civil Procedure of the State of California, and by the provisions of subdivisions "one," "two," "three," and "four" thereof.

Wherefore, having fully answered, defendant asks to be hence dismissed, and that plaintiff take nothing by reason of this action, and that defendant have judgment for its costs, and for all other and proper relief.

REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Alexander McCaw, being duly sworn, deposes and says, that he is an officer of the Integral Quicksilver Mining Company, defendant in the above-entitled action, to wit, Superintendent and General Manager thereof; that he has read the above and foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and, as to those matters, that he believes it to be true.

ALEXANDER MCCAW.

Subscribed and sworn to before me this 10th day of January, 1894.

[SEAL] CHAS. H. PHILLIPS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service of within Answer admitted this 11th day of Jan., 1894. Cross, Hall, Ford & Kelley, Attorneys for Plaintiff. Filed, January 11th, 1894. W. J. Costigan, Clerk.

United States of America.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Altoona Quicksilver Mining Company (a Corporation), Plaintiff, vs. Integral Quicksilver Mining Company (a Corporation), Defendant.	No. 11872.

Verdict.

We, the jury, find in favor of the plaintiff.

J. C. Johnson,
Foreman.

[Endorsed]: Filed October 5, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, in and for the Northern District of California.

THE ALTOONA QUICKSILVER MINING COMPANY (Corporation),
Plaintiff,
vs.
THE INTEGRAL QUICKSILVER MINING COMPANY (a Corporation),
Defendant.

Judgment on Verdict.

This action came on regularly for trial on the 11th day of September, A. D. 1895. The said parties appeared by their attorneys, Messrs. Cross, Ford, Kelly & Abbott, counsel for the plaintiff, and Messrs. Reddy, Campbell & Metson, counsel for defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined, and documentary evidence was introduced. During the trial of the cause the counsel for the defendant formally stated in open Court that the said defendant did not claim, and does not claim, the Altoona Ditch, or any water right appurtenant to it. At the conclusion of the evidence the counsel for the plaintiff formally withdrew all claim for damages. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court with the verdict, signed by the foreman, and,

being called, answered to their names, and say, "We, the jury, find in favor of the plaintiff."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff have and recover from the said defendant the possession of the Boston Ditch described in the Complaint in said action, and all rights appurtenant to said Boston Ditch; taking water from Crow Creek and running thence across Wiltz Ravine (and taking the water therefrom), and extending thence and therefrom to the Altoona Quicksilver Mines, said ditch being situate in Cinnabar Mining District, Trinity County, California, and the sum of $\$37\frac{10}{100}$ taxed as costs.

Entered October 5th, 1895.

W. J. COSTIGAN,
Clerk.

A true copy.

Attest: W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

Altoona Quicksilver Mining Company (a Corporation),

vs.

Integral Quicksilver Mining Company (a Corporation).

No. 11872.

Certificate to Judgment Roll.

I, W. J. Costigan, Clerk of the Circuit Court of the United States for the Ninth Judicial Circuit, Northern

District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 5th day of October, 1895.

[SEAL] W. J. COSTIGAN, Clerk.

[Endorsed]: Judgment Roll. Filed Oct. 5th, 1895. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY, Plaintiff,

vs.

INTEGRAL QUICKSILVER MINING COMPANY, Defendant.

Substitution of Attorney for Defendant.

E. W. McGraw, Esq., is hereby substituted as attorney for the defendant in the above-entitled action in our place and stead.

Dated Oct. 14, 1895.

REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

I hereby accept the substitution of myself as attorney for the defendant in the above-entitled action in the place and stead of Reddy, Campbell & Metson.

Dated November 4, 1895.

E. W. McGRAW.

[Endorsed]: Filed Nov. 4, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the July term. A D. 1895, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 4th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, Circuit Judge.

ALTOONA QUICKSILVER MINING CO.
vs.
INTEGRAL QUICKSILVER MINING CO. } No. 11,872.

Order for Substitution of Attorney.

Upon motion of E. W. McGraw, Esq., attorney for defendant, and upon filing substitution of attorney, it is ordered that said E.W.McGraw, Esq., be and he hereby is substituted as attorney for the defendant herein, in place and stead of Messrs. Reddy, Campbell & Metson.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY,
Defendant.

Bill of Exceptions.

Be it remembered, that on September 12th, 1895, the above-entitled cause came on for trial before the Court and a jury duly impaneled.

The plaintiff, to sustain the issues on its part, offered and read in evidence the deposition of A. W. Hawkett, the evidence of which witness tended to prove: That he was one of the parties who originally located what is now known as the Altoona Quicksilver Mining Claim. That he first went to the vicinity of the mine in 1871, and prospected for cinnabar, which is the ore of quicksilver. That he had two partners by the name of John A. Lytle and James McKinley Crow. We went there in 1871 and posted up the notice of location in 1872. It was so posted that the elements would naturally destroy it. We caused the notice to be recorded at the County Clerk's office, Weaverville, where it was customary to record mining notices in that county. I believe the certified copy of the record shown me to be a copy of the notice we posted. That

Hawkett and his co-locators continued in possession of the Altoona and Trinity claims till August, 1875, and in the mean time dug a ditch from Crow Creek to supply their claims with water, which ditch was known by the name of the Crow Creek Ditch. That no other ditch had been constructed in 1875. That the ditch was built for the purpose of concentrating ore on the Altoona ground. We needed the water to sluice out and concentrate the ore. We would have had to pack the ore eight miles to work it unless we concentrated in at the mine, and so we concentrated as closely as we could. That was to get the quicksilver out of the ore. That it was completed in the spring of 1875—May or June of that year. I saw another ditch there when I was at the mine four years ago. It had not been constructed and there was no other ditch there, excepting the one we built when I left there in 1875. When I left, the Crow Creek Ditch took all the water, and then we did not have enough to sluice with. We made holes there and got rockers to utilize the water in this way. It takes more water to sluice with than it does to rock with. We were using all of the water of the creek. We had the ditch dug, but Chinamen did the digging. Mr. Lytle and myself paid for it. The ditch was built to concentrate our ore and work the ground on the Altoona claim. I think the ditch was completed in May or June, 1875, and we continued to use the water from the ditch until we sold out to Mr. Zellerbach, in August, 1875. That the ditch he dug was about one and a half feet on the bottom, two and a half feet on top, and about a foot and a half deep. I often walked along the ditch when

the water was running in it. The water ran about as fast as a man would walk. That in that ditch there would not be any water in the winter if there was much snow there; from the spring it would last up to August that year after the snow went off. That is the only year I know about. That as long as the witness was there the water in the Altoona Ditch was used on the Altoona mine. That during the time he, witness, was there, they used all the water that came down Crow Creek to the head of the ditch. That the witness sold out and left there in August, 1875.

Plaintiff then offered in evidence the notice of location of the Trinity mining claim by John A. Lytle, A. W. Hawkett, and James McK. Crow, dated August 8th, 1872, and recorded in the office of the Recorder of Trinity County, Cal., Aug. 15th, 1872, to the introduction of which notice in evidence defendant objected, on the ground that the same was irrelevant, incompetent, and immaterial.

The objection was overruled by the Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Also, by the same witness, plaintiff offered evidence tending to prove: Crow left there in 1873. Mr. Lytle continued to work on the mine until I left. We used the water all the time as long as I was there. When there wasn't water enough to fill the ditch we took all the water that came to the head of the ditch. That after 1875 witness did not return to that vicinity again until 1890. That at that time the ditch he built looked about the same as it did when he built it. That

the water flowing in Crow Creek was about the same as when he was there previously. That at different seasons of the year the waters of Crow Creek varied from four or five hundred inches to a few inches. That the capacity of the Crow Creek Ditch was about four hundred inches. That the water of Crow Creek is lowest in August and September.

Plaintiff offered in evidence a deed dated August 1, 1873, from James McKinley Crow to John Gray, of Crow's interest in the Trinity Mine, acknowledged the same date, recorded in the County Recorder's office of Trinity County, August 4, 1873. Also a deed from John Gray to David McKay of the same interest, dated August 2, 1873, acknowledged the same date, and recorded in the County Recorder s office of Trinity County, August 4, 1873. Also a deed of the same property from David McKay to Fred H. Loring and Augustus Rumfeldt, dated September 23, 1874, acknowledged the same date and recorded in the County Recorder's office of Trinity County, September 28, 1874. Also a deed of the same interest from Rumfeldt and Loring to A.W. Hawkett and J. A. Lytle, dated October 5, 1874, and acknowledged the same date, and recorded in the County Records of Trinity County October 19, 1874. To each of which conveyances defendant objected, on the ground that the same were irrelevant, immaterial, and incompetent; which objections were overruled by the Court; to which rulings of the Court defendant, by its counsel, duly excepted.

At ordinary stages of water in Crow Creek there is from about 1000 down to 100 miner's inches of water

running in Crow Creek. When I left there in August, 1875, all of the water of Crow Creek was running into the ditch. I think the ditch carried four or five hundred inches. The water is the lowest in those mountain streams in August and September. I remember the condition of the water there, because we were short of water at the mine and needed the water. That season we sluiced there for awhile, whilst we had water enough to sluice with and run the undercurrents.

Plaintiff next introduced as a witness Patrick Horan, whose evidence tended to prove: I worked for the Altoona Quicksilver Mining Company. At first I worked for Mr. Hawkett and Mr. Lytle. That he began work on the Altoona Mine about June, 1875, and discontinued working there in the fall of 1879. That he knew the Crow Creek Ditch, otherwise called the Altoona Ditch. That it heads in Crow Creek. That Wiltz Ravine empties into Crow Creek Ditch. That Crow Creek Ditch took its water from Crow Creek and Wiltz Ravine. That when he was there in 1875 there was no other ditch out of Crow Creek or Wiltz Ravine. That while he was there the water of the Crow Creek Ditch was used on the Altoona Mine for concentrating the ore, on retorts, for condensing, and for drinking purposes. We run the water until it froze up in the ditch. I tended the Crow Creek Ditch. It was also known as the Altoona Ditch. It took water both from Crow Creek and Wiltz Ravine. I did not know of any other ditch taking water from Crow Creek or Wiltz Ravine in 1875. The Altoona Ditch was about two feet and a half wide on the top, about 18 inches wide on the bottom,

and about 18 inches deep. The Altoona Ditch took all the water from Crow Creek and Wiltz Ravine in low stages. The concentrating was done by hydraulic piping. We piped against the bank and cut the dirt all away and washed it down into the sluices. That he first knew about the Boston Ditch in 1876. That the Boston Ditch headed at Wiltz Ravine and runs along to the old Boston Mine, and extends on down three or four hundred yards—I don't know the exact distance—to where we had a reservoir to save the water in when the water got too scarce in the fall of the year. Then we run the water into the Altoona Ditch so as to keep our pipe a going, and it was used at the Altoona Mine. I helped dig that portion of the Boston Ditch for the Altoona Quicksilver Mining Company. As near as I can tell, that was in 1876. It might have been a year or two earlier or later. That he does not know the proportions of the ditch that runs from Crow Creek to Wiltz Ravine. That whilst he was there they ran the water from Boston Ditch first to a reservoir, and then into the Altoona Ditch, so as to keep the pipe a going. That the Altoona Quicksilver Mining Co. extended the Boston Ditch from the Boston Mine down to the reservoir. That the Boston ditch was about a foot in diameter on the bottom, and the water ran three or four or five inches deep—small head. It took all the water there was in Wiltz Ravine at that time at the head of the ditch. That the upper or Boston Ditch took the water higher up than the Altoona Ditch. When the Boston Ditch doesn't take the water from Wiltz Ravine or Crow Creek, the water empties into the

Altoona Ditch. That he had used the water of the Boston Ditch for piping one season before he left. That about July, 1876, witness built the extension of the Boston Ditch from the Boston Mine down to the reservoir. That he used the water from the Boston Ditch the same season.

That it was after the Boston Mine stopped that the extension of the Boston Ditch was built. That while the Boston Mine was worked, the water of the Boston Ditch was used on that mine. That he did not use any of the water out of the reservoir in 1877, 1878, or 1879. The season of lowest water is from the middle to the latter part of August, and the month of September. That the witness visited and examined the ditches last year, and that they are about the same size now as when he knew them. There wasn't quite as much water in the Boston Ditch then as when he knew it.

Plaintiff next offered the evidence of John A. Lytle, tending to prove: That he was first in the Cinnabar Mining District in 1872. In 1874 I posted a notice on the Altoona Quicksilver Mining Claim, claiming that claim for mining purposes. I caused a record of it to be made in the county records of Trinity county, where it was customary to record mining notices for that district at that time. Witness is shown a certified copy from the records of Trinity County, and testifies that he believes that to be a copy of the notice posted; that it was made out by the United States Deputy Mineral Surveyor, Mr. Lowden, on the ground, and that either the witness posted it or Mr. Lowden posted it for him; that it was done under the witness' orders and pay. After

posting that notice we went to work on the two Altoona claims, Mr. Hawkett and myself. The two locations are adjoining. We worked on those two claims, the Trinity claim and the Altoona claim, concentrating ore. Cinnabar had been discovered on both of the claims before the locations were made. Hawkett and I discovered them. We were working together as partners. That while we were working on the Altoona and Trinity claims, we got water from the Crow Creek Ditch. That the ditch was built by Hawkett and himself. That the Crow Creek Ditch was built by them in 1873 or 1874. That while the ditch was used, it was used for concentrating cinnabar ores. We first took the ores out of the mine, and then we shoveled the ore into sluices, and by running the water through them and wash away all the gangue and slimes, and the cinnabar, like gold, being heavy, it settled in the riffles, and then we would clean it up. We had two lines of sluices side by side. We would concentrate it from four or five per cent down to ninety per cent of cinnabar. The sluices had a grade of 12 inches to 12 feet. That its water failed late in the year. That there was scarcely any water in Crow Creek Ditch late in the year, and none at all in winter. That in the spring of the year, when the snow melts, they had more water in Crow Creek than the ditches would carry; by the latter part of August or the first of September we could get only a few inches of water through the ditch. We could use it there for a good many purposes around the mine. We used it on the condensers. There was water enough for rocking at almost any season of the year. At almost

any season of the year there could be water procured for rocking. When the ditch was full of water the water run about two and a half miles an hour.

That the witness in July, 1875, turned over the Altoona mines to M. Zellerbach. That the witness practically delivered possession to Zellerbach when he sold out. After I left there in 1875, I went up there to work for the Altoona Quicksilver Mining Company again in the summer of 1888. I cleaned out the shaft and retimbered it, retimbered the tunnel, graded around the shaft for a hoisting works, burned a brick kiln, repaired the roads, and did some other work. I went up there about the first of August and worked until about the first of October. Then we shut down the work, and I left some men in charge of the mine, and they stayed there all winter. I went there again the next March, but only stayed two or three days. At that time I found the gang of men there that opposed my working. When I was there in 1888, I was superintendent, and had 24 or 25 men working under me on these mines and the brickyards and roads. All of that work referred to the working of the mines. At that time I used what little water there was for making brick to build a furnace to reduce the quicksilver ores. That water came from the Altoona Ditch. But there was very little water in the ditch. We quit work in October, 1888, for want of funds to go on with. When I went there in 1889 to work I was employed for the Altoona Quicksilver Mining Company by Mr. Zellerbach. I took four or five men with me for a starter. We were there a week or ten days. Then we got into trouble with some other

men who represented the Altoona Company also. We had a controversy, and I went to Weaverville about it. They stopped some of our teams on the road loaded with machinery. I went to Weaverville to invoke the authority of the law. The attorneys there did not seem to give me any encouragement about taking a hand in it, and the amount of it was that it kind of flummuxed out. While I was in Weaverville I heard there was an injunction out, but it was not served on me. I quit work because I found an armed force of men there resisting my working, and found that I had no support from the men supposed to be the officers of the company, neither any means or advice or counsel, that seemed to have any reason or sense about it, so I quit. I never was there again except in June, 1893, I went to examine the Central claim. Thatat the time the Altoona or Crow Creek Ditch was built there was no ditch taking water above the heading of that ditch. We took the first water that was taken out of Crow Creek, in the Altoona or Crow Creek Ditch. The Boston Ditch was built afterwards. We run water in the Altoona Ditch long before the Boston Ditch had any work commenced on it at all. In 1888, in August, we could hardly get enough water out of those streams to run our brickyard. They were not running the Boston Mine or the Upper Ditch at all at that time. I think we got from ten to fifteen inches. In March, April, and May, when the snow is melting, there is a large amount of water goes down that creek. We had water running through the Altoona Ditch for a year before I left the mine in 1875. When I went back to the mine in

1888 it didn't look like a deserted mine, because there was a man there working on the mine, washing and concentrating ore. They were using the water out of the ditch, and had been using water there. When I got there Mr. Girard was working on the Altoona Mine. I went up the ditch pretty near to its head. I went along the ditch three or four times in 1888 and once in 1889. That the witness was not at the Altoona Mines from 1875 to 1888. That he went back there in 1888 to reopen the Altoona Mine. That in 1888 the Boston Ditch from the north fork of Crow Creek to Wiltz Ravine was all out of repair. That in 1888 they were not running water through the Boston Ditch to the Boston Mine while I was there, but might be during that season. That he thought there was no water in the ditch when he was there from the Boston Mine to the Altoona Mine. There might have been water there before I got up there, but I didn't see it. That Butler was in possession of the Boston Mine in 1888. That in 1888 there was an old ditch from the Boston Mine to the Altoona Mine, but there was no water in it. I crossed the Boston Ditch once in 1888, and that was the latter part of August. That it was in the latter part of August when he was up there. That the Altoona Ditch was built before the Boston Ditch.

In connection with the testimony of this witness, plaintiff offered in evidence the Notice of Location of the Altoona Mine, by John A. Lytle, September 26th, 1874, and recorded in the office of the Recorder of Trinity County, October 15th, 1874, which was objected to by defendant

as immaterial, irrelevant, and incompetent. Objection was overruled by the Court, to which ruling of the Court defendant, by its counsel, duly excepted.

Plaintiff offered in evidence a series of mesne conveyances: a deed from John A. Lytle to Philip W. McCarthy of the undivided one-tenth of the Trinity Quicksilver Mine, dated October 17, 1874, acknowledged the same date, and recorded in the County Recorder's office at Trinity County, October 23, 1874. A deed from Lytle and McCarthy to Marks Zellerbach, dated July 1, 1875, of the undivided one-half of the Trinity claim, as located by Hawkett, Crow, and Lytle, acknowledged July 7, 1875, and recorded July 19, 1875, in the Recorder's office of Trinity County. Also a deed from A. W. Hawkett to Mark Zellerbach, dated August 13, 1875, acknowledged the same date, and recorded in the county records of Trinity County, August 16, 1875, which deed purports to convey one-half of the Altoona Mine, one-half of the Trinity Mine, and one-half of the Crow Creek Ditch. Also deed from Lytle, Hawkett, and McCarthy to Zellerbach, dated September 8, 1875, acknowledged the same date, and recorded September 24, 1875, purporting to convey the Altoona claim, the Trinity claim, and the Crow Creek Ditch and water rights, to each of which said conveyances defendant, by its counsel, objected, on the ground that it was immaterial, irrelevant, and incompetent. The objections were overruled by the Court, to which ruling of the Court defendant, by its counsel, duly excepted.

Plaintiff offered in evidence the Articles of Incorporation of the Altoona Quicksilver Mining Company, dated

August 24, 1875, duly filed in the County Clerk's office of Trinity County, and in the office of the Secretary of State of the State of California; also the certificate of incorporation of the plaintiff, duly certified by the Secretary of State, and dated September 23, 1875. Also a deed from M. Zellerbach to plaintiff, dated August 13, 1875, and acknowledged September 26 of the same year.

Plaintiff recalled Patrick Horan, whose evidence tended to prove: That he had made a mistake in his former testimony; and that it was in 1878 that he used the water out of the Boston Ditch. I piped and concentrated there altogether for three years, all but in the winter, when I could not use the ditch from snow and frost.

Plaintiff then offered the testimony of J. M. Gleaves, which tended to prove: That he is a competent and qualified surveyor and civil engineer. That he knew the Altoona and Trinity quicksilver mines of Trinity County, California. That he knew the Boston Ditch and the Altoona Ditch. That he had made a survey of them in August, 1895, and platted the result of the surveys. (Witness presented a map of the surveys, copy of which is herewith filed and marked Exhibit 1.) That this map correctly represented the result of his surveys.

[*Map Exhibit 1. See end of this Record.*]

Plaintiff next offered the testimony of W. B. Littlefield, which tended to prove: That he knew the Altoona Quicksilver Mines in Trinity County. That he first went to those mines in the fall of 1875 for the purpose of selling cattle. That he saw a ditch with water run-

ning in it near the mine. That he went there to live in January, 1876. There were working the Altoona Mine at that time. That he lived between the Altoona Mine and the Boston Mine. That there was a ditch below his house running out of Crow Creek to the Altoona Mine. That he kept a boarding-house and saloon That he lived there one season, and then moved his house down to the Altoona Mine, and remained there until 1879. That while he was there water was running in the Altoona Ditch the ditch was generally about two-thirds full. That he knew the Boston Ditch, coming from Wiltz Gulch directly above the Boston Mine, and also from Crow Creek to Wiltz Gulch. That this ditch was above the Altoona Ditch—up the mountain. That it was a pretty rough country—mountains and brush—pretty steep mountains. That he was frequently up Crow Creek. That he saw the water running in the Boston Ditch. That he knew of a reservoir that was built while he was there, two or three hundred yards above the Altoona Ditch, between the Boston Ditch and the Altoona Ditch. That the reservoir was below the Boston Ditch. From the reservoir the country slopes southeast towards the Altoona Mine. That the water for the reservoir came from the Boston Ditch, the upper ditch, and went from that reservoir into the lower, Altoona Ditch. That while witness was there the extension of the Boston Ditch from the Boston Mine to the reservoir was made. That while he was there another ditch was dug out of the reservoir leading around to the western slope of the hill, north of the Altoona Mine, quite a ways above the lower ditch. That that

ditch was built after the Boston Mine closed down. That from that part of the ditch, while witness was there, they used water at the Altoona Mine from both ditches and for different purposes, for concentrating ore and for hydraulicing, the same as in a gold mine. The hill was pretty steep from the Boston Ditch down to the mine—I think a slope of about 45 degrees—and the water ran through a pipe. I think it was a six-inch galvanized iron pipe, about four hundred feet long. It had a pressure of 140 or 150 feet. The water went onto the bank and washed everything into the flume. Of the three years that I was there, there was one winter that no water was running in the ditches for two or three months, on account of the deep snow. They first extended the Boston Ditch to the reservoir, and then dug another ditch from just below where it emptied out of the reservoir, and led it around onto the western slope of the hill, and used the water from that ditch for hydraulicing and concentrating the ore. The Altoona Ditch carried the water onto the southern slope of the divide, and from the Boston Ditch you could take it on to the north slope. When they had extended the Boston Ditch they took the water over on to that side of the divide. They used it on the Trinity claim and also on another claim. That a man by the name of Loring used it. I think he rented that water part of one season. I do not know how long. Maybe two seasons, I am not positive. He rented it from the Altoona Company. That he had a good hydraulic head, and the water came out of the Boston Ditch. They had a pipe line from the upper ditch, and the pipe line was about one hundred

yards from my house. They used the water up to about a month before I left. That he thinks they used the water from the upper ditch for two seasons while he was there on the Trinity claim and on the Loring claim. That the Altoona Company built the extension of the Boston ditch from the Boston Mine to the reservoir. That witness left there in December, 1879. That he was not positive, but did not think the Boston Ditch was used in the year 1879. He was foreman of the mine part of two years. That when he first went to that vicinity the Boston Mine was using the water from the Boston Ditch, for sluicing on the Boston Mine. He was pretty positive that the Boston Mine shut down in 1876. Mr. Butler might have mined some on the Boston after that while I was there. That while I was there Mr. Horan had charge of a gang of Chinamen working for the Altoona Company and piping on the Altoona claim side; that is on the southerly side. That witness was back in that locality the year before the trial of the suit. I went along both ditches at that time. The lower ditch was about the same size as when I was there, but wasn't in as good condition. There was water running in the ditch at that time, but it was not near full. They were putting up buildings and machinery at the Altoona Mine. Mr. Horan was with me. I saw the Boston Ditch from Wiltz Gulch down to where it empties into the reservoir for the Altoona Mine; the reservoir near where my house first stood. The Boston Ditch was in retty good condition except the lower part of it. That the lower part of the Boston Ditch, where it enters into the reservoir, was in bad condition—pretty well filled up.

I do not think that it would carry water if water was turned into it. There were some places where it had been washed out, and I think it would let the water out. That Boston Ditch is built on the side of a pretty steep mountain, about 45 degrees, but from the Boston Mine to the reservoir it is not quite so steep. There is timber all along the ditch. The side of the mountain is pretty rocky on the surface, broken rock laying loose over the surface. When there is a heavy snow and the snow goes off with the rain it washed the country up considerably, and sometimes there are slides that will tear a ditch all to pieces. When the ditch was about two-thirds full the water ran about half as fast as a man would walk, or a little faster. If it was full it would run as fast again. When I spoke of the Boston Ditch being somewhat filled up, the filling was with dirt from the upper bank of the ditch, and leaves and pine boughs and one thing and another. I think that the extension of the Boston Ditch from the Boston Mine to the reservoir was built in the summer or fall of 1876. I am not positive. I am pretty sure that the Altoona Company ran water in the Boston Ditch in 1876, and also that they ran water in it the next year, in 1877. That they used water from the Boston Ditch and reservoir for hydraulicing on the Trinity claim in 1876. That they used it probably for two seasons—1876 and 1877, and perhaps in 1878. They used it on the Trinity claim two or three years, and then they used it on the Loring claim afterwards. I rather think that there was no water in the reservoir in 1879. I was there once in 1885, and at that time crossed the ditch in the vicinity of the reservoir. I don't recollect

seeing any water in the ditch or reservoir at that time. I think I would remember it if there had been. That in 1895, when I was at the mine, there was not more than three or four miner's inches of water in the Boston Ditch; that water came from the Wiltz Gulch. The ditch from the Boston Mine up was in very fair condition. That the Boston Mine was closed down in 1876, and was not afterwards worked by the Boston Company. That the ditch from the reservoir was not completed until after they closed down the Boston Mine. That witness was there last year, and the Boston Ditch below the Boston Mine was in bad condition, pretty well filled up, and would not carry water.

The plaintiff next introduced the testimony of M. D. Butler, which tended to show: That the witness knew the Altoona Quicksilver Mining Company's properties, the Boston Mine, the Boston Ditch, and the Altoona Ditch. That he was the original claimant of the Boston Mine. That he thinks the Altoona Ditch was dug in 1875. That he commenced to build the Boston Ditch in 1875, together with his partner, Mr. C. Worland, for the purpose of conveying water to the Boston Mine to concentrate cinnabar ore. That the ditch was completed by the Boston Cinnabar Mining Company, which had previously been incorporated. Here plaintiff introduces in evidence the articles of incorporation of the Boston Cinnabar Mining Company, bearing date July 27, A. D. 1875; also the certificate of incorporation of the same company, dated July 30, 1875. That at the time when the Boston Ditch was commenced the witness and his partner were in posses-

sion of the Boston Mine. That they conveyed the Boston Mine to the Boston Cinnabar Mining Co., a corporation, August 3d, 1875, and thereupon delivered possession to the Boston Cinnabar Mining Company, and that after the deed was made the Boston Mine was in the possession of the Boston Cinnabar Mining Co. That thereafter the Boston Cinnabar Mining Co. constructed the greater part of the Boston Ditch and completed it. That there were two ditches, one coming out of Crow Creek from away up in the mountains, emptying into Wiltz Gulch, another lower down, nearly parallel to the Altoona Ditch, and further up the mountain, conveying the water from Wiltz Gulch and running it around to the Boston Mine. That the Boston Company took the ditch from the Boston Mine to perhaps a quarter of a mile of the Altoona and dropped it down into the reservoir which they dug on the flat, from which they ran a ditch above the Altoona Ditch, to bring the water onto the Trinity claim on the other side of the ridge. That this extension of the ditch was completed in 1876 or 1877. That the Boston Cinnabar Company used the water of the Boston Ditch for sluicing out cinnabar on the Boston Mine.

At this point counsel for plaintiff offered in evidence the deed dated August 16th, 1877, by which the Boston Cinnabar Mining Company conveys to the Altoona Quicksilver Mining Company, in consideration of five hundred dollars, that certain ditch situated in Trinity County, State of California, commencing at the Crow Creek, and running thence to the Wiltz Ravine, and thence

to the mining property of the party of the first part, to wit, the Boston Cinnabar Mining Co., the same being one and a half miles long, more or less, and known as the Boston Cinnabar Mining Company's Ditch, which deed was duly acknowledged August 16, 1877, and recorded in the county records of Trinity County, August 20, 1877.

The deed was objected to by defendant on the ground that it was void, as it appeared that it was made after the grantor had ceased to use the water. The objection was overruled and deed admitted in evidence, to which ruling of the Court, defendant, by counsel then and there duly excepted.

Plaintiff further offered testimony by the same witness, M. D. Butler, tending to prove: That the Boston Mine was abandoned, and long after August, 1877, relocated by him. That witness was manager of the Altoona Mining Co. from May, 1889, to June, 1894, and superintendent there at the mines. That in 1885 or 1886 the witness used water from the Boston Ditch, to concentrate ore on the Boston Mine, after the relocation of that mine by him. That Mr. Charles Allenberg was the Secretary and Manager of the Altoona Quicksilver Mining Company.

At this point plaintiff identified by the witness the letter hereinbelow copied as one received by him shortly after it was written, and offered it in evidence. Counsel for defendant objected, on the ground that the same was immaterial, irrelevant, and incompetent. Objection overruled by the Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

The letter was then read in evidence as follows:

"Jan. 10th, 1889.

"MR. M. D. BUTLER, Cinnabar:

"*Dear Sir:* The Altoona Quicksilver Mining Com-
"pany hereby grants you permission to use the water
"out of the ditches belonging to the above-mentioned
"company this spring, and until such a time as the com-
"pany shall have use for the same, due notice of which
"you will receive from the undersigned. In considera-
"tion therefor, you agree to keep the ditches in good
"order and repair without any charge to this com-
"pany. Please give me in writing your concurrence
"thereto.

"Yours truly,

"CHARLES ALLENBERG,

"Secretary Altoona Quicksilver Mining Company."

Plaintiff next identified by the witness the letters hereinbelow copied as one written and mailed by him at the date thereof and received by Allenberg shortly after, and offered it in evidence. Counsel for defendant objected, on the ground that it is immaterial, irrelevant, and incompetent. Objection overruled, to which ruling of the Court defendant, by its counsel, duly excepted.

The letter was then read in evidence, as follows:

"CINNABAR MINING DIST,,

"Trinity Co., Jany. 29, '89.

"CHAS. ALLENBERG, Esq.:

"*Dear Sir:* I am in receipt of yours of 22nd inst., en-
"closing permit to use water out of ditches belonging to

" Altoona Quicksilver Mining Company, and in consid-
" eration I agree to keep said ditches in good order and
" repair at my own expense, and keep possession of same
" for said company subject to your order.

" Yours truly,

" M. D. Butler."

Plaintiff further offered testimony by the same witness tending to prove: That after the date of said agreement made in 1889 witness sluiced for ore on the Loring claim for one season with water used from the Altoona Ditch. That no water came to the Altoona Ditch from the Boston Ditch at that time in 1889. That in 1890 the witness sluiced for the Altoona Company on the Trinity claim, using water from the Altoona Ditch. That the witness never saw any pipe line on the Boston Ditch or from the Boston Ditch down to the Trinity. I was not in camp during its use, if it was used there. I saw where it evidently had been used, but I was not there when it was in use. That in 1891 witness used the water of the Altoona Ditch for sluicing on the Trinity claim for the Altoona Company. We were taking the cinnabar out of the rich veins on the Altoona mines, and concentrating that ore by the use of this water through a tunnel and sluice boxes, catching the coarse cinnabar in the ravine and boxes, and the fine cinnabar on tables covered with Brussels carpet. We applied the water under hydraulic pressure—whatever pressure we could get. Early in the season we could not take all of the water. There would be more in the stream than the ditch would carry. Later

in the season we would take all that we could get. The Altoona Ditch was about eighteen inches wide on the bottom, twice that on the top, and eighteen inches to two feet deep. That in 1890 and 1891 he was operating for the Altoona Quicksilver Mining Co., and was their general manager and superintendent up there. That the work done on the Loring claim was done with water from the Altoona Ditch. I was not there at the time. I only saw what had been done. That about three-fourths of an acre has been sluiced off the Trinity and Altoona claims. That up to the time witness left, the ledge had been worked to the depth of 120 feet, and there was 800 or 900 feet of tunnel in hard rock.

Question by Plaintiff. Do you know how much ore had been taken out of that mine up to the time that you left?

Objected to by defendant as immaterial, irrevelant, and incompetent. Objection overruled; to which ruling of the Court defendant, by its counsel, duly excepted.

Answer. About 12,000 flasks of quicksilver from the Altoona and Trinity claims. A flask of quicksilver is 76½ pounds.

Question by Plaintiff. Do you know what the value of quicksilver has been during those times?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled by the Court; to which ruling defendant, by its counsel, duly excepted.

Answer. At one time $115.00 a flask, and from that down to $45.00.

Witness stated he had often been in the Altoona Mine and Tunnel.

Question by Plaintiff. State whether or not the ore body appears on the bottom of the tunnel?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled; to which ruling of the Court defendant, by its counsel, duly excepted.

Answer. It does for nearly 600 feet.

Question by Plaintiff. How wide is that ore body?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection overruled; to which ruling of the Court defendant duly excepted.

Answer. It varies from 4 feet to 22½; that was apparent in the bottom of the tunnel, right through there, and all of the work had been done above the level of the tunnel.

Witness further gave evidence tending to prove: That the witness sluiced on the Boston Mine in 1886 and 1887 with water from the Boston Ditch. I relocated the Boston Mine, September 10, 1885, and it was after that that I used the water.

Question by Plaintiff. Did you have any controversy with the superintendent of the Altoona Company about your right to use that water?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection overruled; to which ruling of the Court defendant, by its counsel, duly excepted.

Answer. I did; with Louis Girard (who was the representative of the Altoona Quicksilver Mining Company of the ground), about the use of the ditch and water.

Question by Plaintiff. What did he say to you about it?

Same objection, ruling, and exception.

Answer. He came on the ditch and told me I must stop using the water of the ditch; that it was the property of the Altoona Company.

The witness further gave evidence tending to prove: That the witness first went to Cinnabar Mining District in 1873 or 1874. That there were no fences or enclosures anywhere in the district at that time. That so far as appearances went, no land had been taken up except for mining purposes. That the district is about 4500 feet above the level of the ocean. That there were no inhabitants in the country except prospectors. That in the year 1886 witness concentrated ore on the Boston mine with water from the Boston Ditch. That they took all the water the ditch would carry. The water came from Wiltz Gulch and Crow Creek. That they commenced about March 12th and continued as long as the water lasted—perhaps about three months. That in 1887 he did the same; in 1888 the same. That he used the water a short time in the year 1889, until in April, on the Boston Mine. That in 1889 the witness had possession of the Altoona Ditch by consent of Mr. Allenberg, secretary of the plaintiff. That he used the water from the Altoona Ditch on the Altoona claim concentrating the ore. That in 1890 witness used water from the Altoona Ditch on the Altoona Claim; also in 1891 and 1892, concentrating ore. That in 1892 water was turned into the Boston Ditch, above the Altoona Ditch, by Professor McCaw or his employee. That McCaw was at that time president of the corporation defendant. That water was turned into the Boston

Ditch by the McCaws, and a notice posted by the Integral Mining Co. claiming the water. That the McCaws cleaned the ditch and took the water to the Integral Mine, and used it at their furnace and at the cook-house at the Boston Mine. The corporation was the Integral, but the mine always went by the name of the Boston. The Integral Company took possession of the Boston Mine some time in 1891 or 1892. The taking of the water in the Boston Ditch reduced the flow of the water in the Altoona Ditch. It lessened the flow materially. That the taking of the water through the Boston Ditch that year did not interfere with the Altoona Co., having all the water it needed through the Altoona Ditch. That the defendant took possession of the Boston Mine some time in 1891 or 1892. That witness turned the water out of the Boston Ditch so that it would go down to the head of the Altoona Ditch, for the purpose of keeping the water running continuously at the Altoona Mine, on August 9, 1892, and posted a notice that the Altoona Company claimed the ditch and water right, and forbidding any person trespassing upon those properties, and also about the 17th of August. I needed all of the water at those times for use on the Altoona Mine. That two days after the witness turned the water out of the Boston Ditch the McCaws turned it back into the Boston Ditch again. That they continued to use it afterwards that season at the Boston Mine.

Question by Plaintiff: What happened after that between you and any officer of the Integral Company, and what conversations occurred between you and any

officer of the Integral Company with regard to the use of this water, if any?

Answer. I met Professor McCaw on the trail one day. He was going out to the railroad and I was coming in. He protested against my interfering with the water; and warned me that if I continued that interference his gang would string me up.

Counsel for defendant moved to strike the answer of the witness out, because it had nothing to do with the case.

The motion was denied by the Court; to which ruling of the Court the defendant, by its counsel, duly excepted.

The witness further gave evidence tending to prove: That the witness in turning the water off was acting as agent for the Altoona Co. That prior to January, 1889, when witness was using water out of the Boston Ditch, Girard, superintendent of the Altoona Co., came up and turned it off, and notified him that it was property of the Altoona Co., and that witness could use it only by permit. That the witness made some sort of a compromise with Girard by which the Altoona Company, which Mr. Girard was representing, would allow us to use the water, and continued to use the water. That during the years 1886 and 1887 and 1888 he was frequently in San Francisco, and saw Mr. Allenberg at his office, and conversed with him about the ditches, but could not repeat the conversation. That the Boston Co. completed the Boston Ditch to the Boston Mine only. That the Boston Mine lies just above the present furnaces of the defendant. That the Boston

Ditch was constructed from the Boston Mine by the Altoona Quicksilver Mining Co., first to a reservoir and thence to a point above the Altoona and Trinity mines. That he made a mistake when he testified that the Boston Company constructed any portion of the ditch below the Boston Mine. That the Boston Company constructed the ditch only down to the Boston Mine, to the vicinity of the present works of the Integral Company; that from there on the ditch was constructed by Mr. Lawrence, representing the Altoona Quicksilver Mining Company, first to a reservoir, and then continued around to the Altoona and Trinity mines, and dropped down on to the Trinity claim, owned by the Altoona Quicksilver Mining Company, and the claim below.

In 1886 or 1887 the witness used the water from the Boston Ditch also on the Dolliffe mines, which has also been called the Ruby and El Madre, his son, Mr. Tichenor, and Mr. Robertson, and himself having gotten permission from Mr. Allenbery to use the Altoona Ditch, and take the water for that purpose. We worked one year, as long as the water continued sufficient to mine with. We were mining by the hydraulic method. That the witness never saw the water running in the extension of the ditch. That in 1888 or 1889 witness used water from the Altoona Ditch on what was known as the Loring or Ruby claim. Witness having been shown a letter, and identified the same as in his handwriting, and having stated that he wrote the letter at about the time the letter bore date, says: That it was about the 1st of August, 1889, when witness ceased to use the water of the Boston Ditch on the Boston Mine. That it was

about August 9th, 1892, that witness turned the water out of the Boston Ditch. Witness, at the time he turned the water out, posted notices that the Altoona Company claimed the ditch and water right, which notices very shortly afterwards disappeared. That witness turned the water out of the Boston Ditch the second time about August 17, 1892, because he wanted to keep the water running in the Altoona Ditch; because if I discontinued the water I never could get it around again until rains came.

On cross-examination of the witness, defendant elicited evidence tending to prove: I think that the Boston Mine was abandoned by the Boston Co. in 1876. I was back there a number of subsequent years. I do not remember whether I was there in 1877 or 1878. I am sure I was back there in 1882. That prior to its abandonment, it was probably worked for about three years. That in about 1882 the witness relocated the Boston Claim. That the water from the ditches would usually flow until in August or September. That it would fail in the upper, or Boston, ditch before it would fail in the Altoona Ditch. That from 1882 to 1892, witness was familiar with that portion of the Boston Ditch extending from the Boston Mine to the reservoir. That during that period no water flowed through the ditch from the Boston Mine to the reservoir, to his knowledge. He could not say positively that it was in 1876 that the Boston Mine was abandoned. That witness conveyed the Boston Mine to the McCaws, from whom the Integral Company derives title. That from the time he relocated the Boston Mine, he

was there continuously until he made the conveyance, which must have been three or four years. That the Boston Mine was not worked from 1876 to 1882, to his knowledge. That from the time of the relocation by witness of the Boston Mine no one ever interfered with his possession of it. That after he relocated the Boston Mine he was there continually until he conveyed it to McCaw. That in 1889 witness moved over to the Altoona Mine as manager for plaintiff. That in 1892 the Boston Ditch between the Boston Mine and the Altoona reservoir was filled up with gravel, sand, rocks and trees, more or less, and was not in a condition to run water. That it was not in condition to run water in 1882, when witness relocated the Boston Mine, nor was that portion of the ditch between the Boston Mine and the reservoir in condition to conduct water in any year between 1882 and 1892. That in 1882, when witness relocated the Boston Mine, the Boston Ditch from Wiltz Gulch to the Boston Mine was in a similar condition to the other part of it; it had to be cleaned out to run water through it. That from 1882 to 1886 no water ran through the Boston Ditch except that used by witness on the Boston Mine. That witness used the water in hydraulicing in 1886, 1887, 1888, and a portion of 1889. That he did not use any water between 1882 and 1886. That the portion of the ditch that extended from Crow Creek to Wiltz Gulch was commenced by witness in 1875 and it was finished the next season. That about 100 or 150 yards from where that ditch heads out of Crow Creek it runs around the brow of a hill; it was carried through a flume; from 1882 to 1886 there was no flume there—

it was broken down. That in 1886 witness repaired the flume. That the flume was made of three planks, twelve inches wide. That the witness turned the water out of the Boston Ditch in 1892, because he was instructed to turn it out, not because they had any use for the water at the Altoona Mine at that particular time. That in 1886, when witness cleaned out and repaired the Boston Ditch, it had not been used for a great many years. That since 1889 there has been a change in the method of working ore in the Cinnabar District. That since then they have adopted furnaces. That the witness never used any water on the Trinity claim or the Altoona claim from the Boston Ditch. That the defendant used the water of the Boston Ditch at its furnaces. That it requires only a few inches of water for that purpose. That when witness started in to use the water of the Boston Ditch, and Mr. Girard objected to it, no one else was using the water. That when Mr. McCaw started in to use the water, and witness turned it off, no one else was using the water from the Boston Ditch. I am not sure whether it was in 1882 or 1883 that I went back there. That from 1886 to 1892 the Altoona Company had made no use of the water through the Boston Ditch for their own benefit. They worked the Altoona Mines by the hydraulic process until I left there, and I have not been there since. That a map produced by the defendant of the Cinnaber Mining District, Township 38 North, Range 6 West, Mount Diablo meridian, Trinity County, is, in the opinion of the witness, reasonably correct. The witness pointed out on the map the location of Crow Creek, the Boston Ditch, the reser-

voir, and stated that the location of the Boston Ditch below the reservoir on the map was incorrect. Witness examined the mining claims as laid down on the map, and stated that they were laid down about right. He thought they were quite correct as laid down. That the map presented a very good outline of the country.

(Copy of said map is herewith filed, marked Exhibit 2.)

[*Map Exhibit "2." See end of this Record.*]

Witness, on cross-examination, gave further evidence tending to prove: That there never was any place where the waters of the Boston Ditch, after leaving the Boston Mine, ran down into the Altoona Ditch. That witness was on the Boston Ditch between 1889 and 1892, and it was then in very good condition; in reasonably good condition.

I did not see them use the water from the Boston Ditch on the Loring Claim, but when I went back there in 1883 I could see that they had been using the water from the Boston Ditch on the Loring Claim. They could not have done the work on the Loring Claim which had been done unless they used the water from both ditches. I only know that they used the water on the Loring Claim from the Boston Ditch from the appearances. That before the witness started in to use the water on the Boston Mine when he said Mr. Girard registered an objection, no one else was using the water through the Boston Ditch. The water was being used through the Boston Ditch on the Boston Mine up to 1876 or 1877. When I attempted to use

the water in 1886, I was stopped by Mr. Girard, who said the Altoona people claimed the water. I then obtained from them a right to use first the Boston Ditch and afterwards, in 1889, the right to use both ditches. I then used the water from the Boston Ditch in 1886, 1887, 1888, and 1889. In 1892, when McCaw put up his notice and started in to use the water, I, acting for the Altoona Company, put up a protest. When I went there in '86 they were using the water through the Altoona Ditch. They worked two or three seasons concentrating, and they were running water through the Altoona Ditch all the time, to the best of my remembrance. In hydraulicing we used a pipe with an elevated reservoir, so that it gives force to the water to cut away the bank. In sluicing we run the water over the ground and pick our ground out that we wish to convey away by the force of the water. In working the Altoona Claims we hydrauliced them all. I am not aware that they hydrauliced any more. In using a furnace they do not hydraulic or ground sluice. How much water would be required to run the furnaces depends upon whether they hoist with water or with steam, and I don't know how much water is required on the furnaces themselves. We had not got to using the water to hoist with when I lelt the mine. There is sufficient water there for water power for hoisting works certain seasons of the year. By piping the water it might be sufficient for that purpose all the year around. Defendant's counsel shows the witness a letter dated August 9, 1882, and reads from it as follows, said letter being written by the witness to Mr. Allenberg: "This

A. M. turned all of the water out of the Boston Ditch and posted notices. McCaw is not here. Go to concentrating on Thursday morning, and must have all the water." And witness states that as far as he knows that letter was all true. Any water which they take in the Boston Ditch during low stages interferes with the water of the Altoona Ditch.

On redirect examination plaintiff elicited testimony from witness tending to prove: That it was in 1883 that he relocated the Boston Mine, instead of 1882, and that it was about the last of July, 1883, when he returned to the Cinnabar District (instead of 1882), after leaving there in 1877, and between those years he was only in there once, and that that would affect his testimony about the water not running in the Boston Ditch in 1882, for he didn't know anything about it until he returned there. It would also change the witness' testimony with regard to his having been at the Boston Mine continuously from 1882; that after he relocated the Boston Mine he was away from there at different times two months or a month at a time, attending to his mining interests at French Gulch; also that the date when the Boston Mine was abandoned was 1877 instead of 1876. Witness makes this correction after being shown the deed from himself and Worland and wife to the Boston Cinnabar Mining Company, dated August 7, 1875, and testifies that the Boston Mine was worked two summer seasons after that deed was made.

By witness F. H. Loring, plaintiff elicited facts tending to prove: That he first knew the Cinnabar Mining District in Trinity County in 1873. That he knew the

Altoona and Trinity quicksilver mining claims; they were called the Altoona Mine. That he knew the Altoona quicksilver mining property from 1873 to 1885. That in 1881 there were two ditches in the vicinity of the Altoona Mine, the upper and the lower ditch; the upper ditch covered the ground on each side of the divide; the lower ditch covered the ground on the Altoona side only. That by the divide the witness meant the divide between the North Fork and the East Fork of Trinity and Crow Creek. That it came on top of the divide between the mine that the witness owned and the Altoona Mine. That the mine the witness owned he called the Davis Mine. That prior to 1881 he had seen water used by the Altoona Company from both ditches in sluicing the ground below the divide. That witness used the water from the upper ditch in working the Davis Mine in 1881, 1882, 1883, and 1884. That H. C. Osgood and Morris Osgood, his son, attended to the ditch at that time. That there were no ditches in the vicinity except the two ditches the witness mentioned. That the witness got the water from the upper ditch on his claim, and it was arranged to come over the divide and to be turned out by means of a box on either side of the hill. That part of the water ran around the hill to the ditch, and thence into a ground sluice, and part of it was run in a pipe; the pipe was about 200 feet long. That in 1881 the witness mined as long as the water lasted. That year the Altoona Company had a lease of my ground and used the water from the upper ditch sluicing out the cinnabar. That at that time he could not get the water from the lower ditch over to his claim. That the next year

he mined the same way about the same time, and also the next year after that. That in 1881, 1882, and 1883, he used the water by arrangement with the Altoona Company; also in 1884. In this connection plaintiff offered in evidence a certain agreement, identified by witness, having first proved the genuineness of the signatures of F. H. Loring and E. L. Goldstein, and also having proved that at that time said Goldstein was president of the Altoona Quicksilver Mining Company.

Counsel for defendant objected to the introduction of said agreement in evidence, on the ground that the same was irrelevant, immaterial, and incompetent. Objection was overruled by the Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Said agreement reads as follows, to wit:

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part.

"Witnesseth: That the said party of the second part "agrees that the party of the first part may have what- "ever water belonging to said party of the second part "is requisite for the working of the quicksilver mine of "said first party, and may use the iron pipe of said sec- "ond party for the purpose of conducting said water to "the mine of said first party, and in consideration thereof "the said party of the first part agrees to give and pay "to the said party of the second part one-third of the "net proceeds of the mine of said party of the first part

" so worked by him. The party of the second part is to " incur no liability or expense whatever in case there " shall be no proceeds from working said mine; and the " party of the first part is not to pay to the party of the " second part any compensation whatever for the use of " said water and pipe, unless and until after all the ex- " penses of working said mine shall have been paid out " of the proceeds thereof. This agreement is not to " continue after the expiration of the year 1882.

" In witness whereof, the party of the first part and " of the second part have executed this instrument the " 31st day of May, 1882.

" F. H. Loring,
" Davis Cinnabar Mine.
" E. L. Goldstein,
" President Altoona Q. Mg. Co."

(Marked " Plaintiff's Exhibit S.")

Plaintiff also had identified and proved the genuineness of the signatures, and that at the date of the instrument said E. L. Goldstein was president of the Altoona Quicksilver Mining Company, and offered in evidence a certain agreement, and defendant by its counsel objected to the introduction in evidence of said agreement on the ground that the same was irrelevant, immaterial, and incompetent. The objection was overruled by the Court, to which ruling of the Court the defendant by its counsel then and there duly excepted.

The said agreement reads as follows:

" This Agreement, made and entered into between " F. H. Loring, party of the first part, and the Altoona

"Quicksilver Mining Company, a corporation, party "of the second part,

"Witnesseth: That the said party of the second "part agrees that the party of the first part may "have whatever water belonging to said party of the "second part is requisite for the working of the quick- "silver mine of said first party, and may use the iron "pipe of said second party for the purpose of conduct- "ing said water to the mine of said first party, and "in consideration thereof, the said party of the first "part agrees to give and pay to the said party of "the second part one-third of the net proceeds of the "mine of said party of the first part so worked by him.

"The party of the second part is to incur no lia- "bility or expense whatever in case there shall be no "proceeds from working said mine, and the party of the "first part is not to pay to the party of the second part "any compensation whatever for the use of said water "and pipe, unless, and until after, all the expenses of "working said mine shall have been paid out of the pro- "ceeds thereof.

"This agreement is not to continue after the expi- "ration of the year 1883.

"In witness whereof, the party of the first and of the "second part have executed this instrument, this sixth "day of March, 1883.

"E. L. Goldstein,

"President Altoona Quicksilver Mg. Co.

"F. H. Loring,

"Davis Quicksilver Mine."

(Marked "Plaintiff's Exhibit T.")

The proceeds of the mining operations of the year 1881, were divided between myself and the Altoona Quicksilver Mining Company; I received one-third for furnishing the ground, and the company two-thirds for furnishing the water and labor.

On cross-examination of said witness Loring, defendant elicited evidence tending to prove: That he had never been on either the Boston or the Altoona Ditch, except in crossing them. That on his direct examination witness was mistaken in the names of the ditches. That he got water from both ditches; that, as he now remembers, the Altoona Ditch was lower down the divide than he supposed. That when he said he was mistaken, he meant that he thought the Altoona Ditch proper was lower down the hill on the divide than he found it was. That he supposed the Altoona Ditch was below the summit of the divide; whereas, in fact, it was on the summit of the divide, and the Boston Ditch still above it. That he never took any water directly from the Boston Ditch. That he got all of his water from the Altoona Ditch. The water that I got in 1882 and 1883 came through the Boston Ditch into the Altoona Ditch. That he never saw any water running from the Boston Ditch into the Altoona Ditch. The way I know that I got water through the Boston Ditch into the Altoona Ditch is, I had a man in charge of my water and paid him for repairing those ditches, and that he was testifying from his general knowledge at the time of the situation in regard to the water, but not from his own knowledge of seeing the water. That if he ever used any of the water of the Boston Ditch it was water which first ran from

the Boston Ditch into the Altoona Ditch, and taken by the Altoona Ditch on to his mine. That the witness remembered an extension of the Altoona Ditch being made through a cut over the divide, so that the water of the Altoona Ditch could be run onto his mine. That the water of the Altoona Ditch would readily flow onto his mine. The Altoona Company worked the ground in 1884, and that witness remembers seeing the water running onto the mine in that year when he visited the mine. The water was running by the usual way in which they always conduct the water, through the Altoona Ditch. That the witness was never along the Boston Ditch in all his life, and never saw any water running in it. That his mine, the Davis Mine, was a claim 600 feet wide and extending north and south a distance of 1500 feet. His location run lengthwise, with the Altoona joining it at the corner of the Altoona and Trinity, and was a portion of the claim marked on the map of the defendant hereto attached, marked "Exhibit 2," as the Ruby claim, and a portion of what is called on said map the Garnet claim. That in the seasons of 1881, 1882, and 1883, they commenced to mine in the spring as soon as the snow allowed the water to run, and continued to mine until the last of July; that they allowed the water to run later to keep the boxes wet up and from falling to pieces; that in the year 1881 he visited the property on an average once a month and would stay one or two days at a time, and it was about the same during the other years.

On redirect examination of said witness, plaintiff elicited evidence tending to prove: That before the Altoona

Ditch was extended, witness' claim was on the opposite side of the divide. That the extension of the Altoona Ditch to carry water to his mine had to cross the divide and run around the side of the hill onto his ground. That before the extension of the Altoona Ditch the witness never noticed any particular change in the divide except in grading in mining operations and running a wagon road across there. That there was sluicing done at or near the summit of the divide. That it was after the sluicing that the Altoona Ditch was extended around and across the divide. That the witness had seen a watercourse coming into the Altoona Ditch on the north side of the Altoona Ditch about 200 yards from the end of the ditch, as the Altoona Ditch was before it was extended. That it was in appearance such as the water would make running from one ditch to another. That it appeared to be more natural than artificial. That it ran quartering down the hill from the direction of the Boston Ditch to the Altoona Ditch. That he had seen ten or fifteen yards of that watercourse. It was worn and had the appearance of any watercourse worn down by water running. That he never saw it at any point where it connected with the Boston Ditch. That the extension of the Altoona Ditch over the divide was made early in the spring of 1881. That he had seen the ditch above his mine. That he never saw a bulkhead there.

Plaintiff, on examination of J. S. Cox, witness, elicited evidence tending to prove: That the witness was a mining superintendent, and lately resided at the Altoona Mine, and knew the Boston and Altoona ditches. That he was the superintendent of the Altoona Quicksilver

Mine about fifteen months, from May, 1894, to September 8th, 1895. That there was no enlargement made of the Altoona Ditch while he was there, and no enlargement of the Boston Ditch by the Altoona Company.

The defendant, on cross-examination of said witness, elicited evidence tending to prove: That while he was superintendent, he put some boxes in the Altoona Ditch and covered them over, six inches square. That there was a string of 20 or 30 boxes. That they were put in for the purpose of giving water during the winter months. The boxes were there yet. That they probably extended three hundred feet. They extended from the Altoona Ditch to the furnace into two different tanks, 300 feet or a little more. That the water that was coming down the ditch for the last year was water that ran through those boxes. That after putting in the boxes he filled in the ditch on each side and covered the boxes over to prevent the water from freezing.

On re-direct examination of said witness, plaintiff elicited evidence tending to prove, that the water carried through those boxes was the water used to supply the engines of plaintiff for steam purposes and to the condensers for the purpose of condensation. That the boxes were put in the immediate center of the ditch at the extreme lower end of the ditch immediately at the mine.

Counsel for plaintiff thereupon asked the witness the following question :

"What other uses could be made of that water at the Altoona Mines by the Altoona Company?"

Question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent. Objection over-

ruled by the Court; to which ruling of the Court counsel for defendant then and there duly excepted. To this question the witness answered: "It can be put to pumping, hoisting, producing electric power and so forth."

Counsel for plaintiff then asked the following question of said witness:

"State whether or not all those purposes are necessary and useful in the working of the mine?"

To which question counsel for defendant objected on the ground that the same was incompetent and immaterial. Objection was overruled by the Court; to which ruling of the Court counsel for defendant then and there duly excepted. To this question the witness answered as follows: "They are both necessary and useful."

On examination of witness E. F. Dack, plaintiff elicited testimony tending to prove: That he knew the Altoona and Trinity Quicksilver Mines, the Boston Ditch, and the Altoona Ditch. That he first became acquainted with them in 1883. That he saw water in the Boston Ditch the first and only time in 1889. That Mr. Butler was using it on the Boston claim hydraulicing. That the witness crossed the head of the Boston Ditch in 1886, in August. That no water was then running in the ditch. In '87, '88, and '89 witness was spending his time on Soda Creek, below the Altoona Mine, and saw the water in the Altoona Ditch, each of those years, running to the Altoona ground. I tried to use the water from the Altoona Ditch and Mr. Butler, the superintendent of the Altoona Company, took the water away from me and told me it belonged to the Altoona Company. Afterwards I got permission from Mr. Rostetter

to use it, and I cleaned out the ditch for the purpose. Mr. Butler and Mr. Rostetter each claimed to be in charge, representing the Altoona Company, but Mr. Butler would not let me use it. In 1888 Mr. Butler and some other men hydrauliced with the Altoona Company water over on the Trinity side. The same year Mr. Lytle used the water, making brick for the Altoona Company. In 1885 I was at the Boston Mine and saw Mr. Butler piping there. I know of his piping there that year two months. In 1891 Mr. Butler was using the water on the Altoona Mines, and I used the water below the place where he used it.

On cross-examination of said witness defendant elicited testimony tending to prove that witness was not in that vicinity from 1883 to 1886; that he went there again in 1886. That he went to the Cinnabar Mining District in the fall of 1887, all of 1888, 1889, and 1891. That he was tolerably familiar with the outline of the Boston Ditch. That he knows where the extension of the ditch was from the Boston Mine to the reservoir. That he never saw water flowing in that part of the ditch. He was not on the Boston Ditch at all in 1886, and in 1888 he was only on that portion of the Boston Ditch below the Boston Mine.

Plaintiff, on examination of the witness Morris Osgood, elicited testimony tending to prove: That he knew the Altoona Quicksilver Mining Company's properties in Cinnabar District. That he first knew them in 1879. That he was then in the employ of that company hydraulicing and concentrating the ore at the Altoona mine on the east side of the divide, that is, the side

towards Crow Creek. That he used the water through a hydraulic pipe about seven inches in diameter. That the fall from the ditch to where he was washing was about sixty feet. That he worked there four seasons. That the first season he cleaned out the lower ditch and worked on the upper ditch too. That he cleaned the upper ditch out. That they built a reservoir there in 1879. (Witness points out on plaintiff's map the place where he thought the reservoir was and marks the place with a cross and his initials.) Other men worked besides me for the Altoona Company in building the reservoir. That after they got the reservoir built they went to work on the other side of the hill, the side that the Loring Claim was on. That he helped to extend the upper ditch about 200 yards out onto a point and run it from the point down the hill, and then took the water into a hydraulic pipe, about northwest from the present hoisting works of the plaintiff; that point would be northeast from the Loring claim; right about the saddleback. That that year witness used the water, washing the surface off, piping; that is, in the year 1879 I helped to extend the ditch from the reservoir to that point. That they got the water from the Boston Ditch through the ditch and through a pipe. That they had a ditch down hill--down the ridge. That they built a bulkhead in there. That the water ran into the bulkhead, and then into the pipe and down to the claim. That the pipe did not run clear up to the ditch; it was a hundred yards from where the ditch dumped down. The water ran from that upper ditch down to that point until it came to the pipe line. That they had about 400 feet of pipe line, seven-inch

pipe. That witness worked there in the year 1880. That he worked at piping on the Loring Claim. That he was working for the Altoona Company. That he got the water out of the Boston Ditch, the same way as in 1879. That the witness was there in 1881, working for the Altoona Company, using the water on the same side. That they used some of the water out of the lower ditch, and used water out of the upper ditch. That they used water out of the upper ditch till it got pretty low, and then used water out of the lower ditch as an overflow to help carry away the waste material. That the witness did not work there in 1882. That he worked there in 1883 for Fred Loring. That he used water on the same side from the Boston Ditch. In 1879 and 1880 there were about twenty of us working for the Altoona Company; in 1881 there were not so many; and in 1883 there was himself and father and two Chinamen. That he attended to the Boston Ditch all the time he was there in 1879, 1880, 1881, and 1883. That he was looking after the water. That when the water would slack off he would go and turn some into the ditch, and keep the rocks out of the ditch. That he was working on the claim and attending to the water, both. That he was the only one attending to the ditch. That along about August or September, the water would slack off, and then they had to use the reservoir. During the years I was there, when we used the water from the Boston Ditch for mining, we used the water of the Altoona Ditch for an overflow. That they would shut the reservoir down and catch the water during the night. That during the night it would fill up, and that

would furnish water the next day. When I tended the Altoona Ditch, it was about three feet wide on top, two feet on the bottom, and the water usually ran about a foot deep. I saw the Altoona Ditch about two years ago, and it was then about the same size as when I tended it. When I went there we had trouble in getting the water through the Boston Ditch, so we built a reservoir on Wiltz Gulch, and sluiced mud down into the Boston Ditch, and the sediments would stop in the rocks. The ditch was dug through loose ground, and the sediment would fill the holes up in the bottom of the ditch.

On cross-examination of said witness, counsel for defendant elicited testimony tending to prove: That he was thirty years old on the 12th of May, 1895, and he was fourteen years old in 1879. That he ran a hydraulic pipe when he was fourteen years old. That the Boston Ditch was not constructed from the Boston Mine clear to the reservoir; it ran into a gulch, and the water was turned in the gulch, and ran down the gulch into the reservoir. That the reservoir was built in the same gulch that the water was dumped off into. That from the reservoir there was another ditch dug around the side of the hill. That it went from there to the Fred Loring and Altoona properties. That he helped to dig some of that ditch in 1880, about a hundred yards of it. That there was not any in it dug in 1881. That he did not use that ditch in 1879. Witness testified he made a mistake there; that it was 1879 when they extended that ditch around, instead of 1880; that they had to extend that ditch to get the water around to where they were working, and that he did

use it in 1879. That it was 1879, instead of 1880, when they extended the ditch. That the Altoona Ditch was dug over the divide, right through the gap. That they used the water from the Altoona Ditch on the Loring Claim. That he did not know of any connecting ditch between the Boston Ditch and the Altoona Ditch. That he did not know of any place between the Boston Mine and the end of the Boston Ditch, where water ran from the Boston Ditch into the Altoona Ditch. It had been so long ago he might have forgotten; that he may have seen it and forgotten it; that he did not remember seeing it. That he did not work for Mr. Fred Loring in 1882, nor in 1881, nor in 1880, nor in 1879. The Altoona Company paid him for his work. He did not know whether in 1881 the work was being done on the Loring claim or the Altoona claims; that he was sure that he last worked there for the Altoona Company in 1883; that the Boston Ditch heads in Crow Creek, runs to Wiltz Gulch, and dumps off into the Wiltz Gulch, and then runs from Wiltz Gulch with the ditch taken out of that, that ran around to another gulch below the Boston Mine, and dumped off from that into a gulch and into a reservoir. That the witness did not know where he was in 1885, 1886, 1887, 1888, or 1889. I was working part of the time in Siskiyou County, and part of the time in Trinity County. I was one place and another—some of the time at Dunsmuir, and sometimes at Weaverville. That if he sat down and figured them up he could tell where he was working.

The witness J. M. Gleaves was recalled for plaintiff,

and from him plaintiff elicited testimony tending to sho w

That the Altoona Ditch was about three miles and a quarter in length. That the Boston Ditch, from the place where it is taken from Crow Creek, runs about a half a mile to the top of the hill, and is there run down a channel made by the water into a gulch called Wiltz Ravine, and runs down that natural channel for about half a mile, and is then taken up and follows along to the point marked "20" on the plaintiff's map. (Exhibit 1.) That there it is thrown into a natural channel or ravine, and flows down that into a reservoir. That it is taken again around to the point marked "10," and drops again about thirty feet through a natural channel to the main ditch. The artificial portion of the Boston Ditch is about two and three-quarters miles in length. That in the Altoona Ditch there is a fall of about 56 feet between its head and its mouth. That in the Boston Ditch there is a fall of about 500 feet. That about 400 feet of that fall is in Wiltz Gulch. That the artificial ditch has a fall of about one-tenth of a foot to the rod. That he measured the capacity of those ditches to carry water. The capacity of the Boston Ditch is 618 miners' inches, measured under a four-inch pressure. The Altoona Ditch, run to its full capacity, is about 1,000 miners' inches.

Counsel for plaintiff at this point asked the witness the following question:

"State to the jury whether or not you made surveys for the purpose of ascertaining the elevation of the lower end of the ditch (the Boston Ditch) above the collar of

the shaft in the hoisting works of the Altoona Mine?'

This question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent. The objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, then and there duly excepted. The witness answered as follows:

" I took the elevation between the collar of the shaft and the mouth of the Altoona Ditch and found about 43 feet difference in elevation."

That between the collar of the shaft and the Boston Ditch on the point of the little hill above the mine the difference was a fraction less than 162 feet; that the collar of the shaft is the main level of the floor in the hoisting works; that the shaft is used for hoisting ores, and for general working purposes of the mine, and for pumping.

All this testimony was given under the objection of defendant as being incompetent, irrelevant, and immaterial, and was admitted by the Court, subject to the exception of the counsel for the defendant to the ruling of the Court.

Also the following testimony was given under the same objection, ruling, and exception.

That there is a cage used for hoisting ore, and for taking men up and down in the mine. That it is operated by steam power for that purpose. That it runs perpendicularly. Mining timbers have to go up and down that shaft. That the collar of the shaft is the upper end—the top. That that is where the cages come to the surface and discharge. That the cages are stopped at the

collar of the shaft and cars loaded with ore are run off and taken out where they are placed in retorts and furnaces. That the shaft had been sunk when witness was there about 240 feet. That when witness was there they were drifting or working at the bottom. That when the level at 240 feet had been worked a good miner would go down and sink the shaft deeper.

On cross-examination of said witness, the defendant elicited testimony tending to prove:

That the Boston Ditch from the Boston Mine down to the Altoona is in bad condition. That apparently it has been unused for several years.

That in surveying the ditch the witness noticed only one place where it was in condition that water would not run through it, and that was where the road crosses it. It had been filled in there with the road.

Witness F. H. Loring was recalled, and from him plaintiff elicited testimony tending to prove that since last on the stand witness had been talking with counsel for the plaintiff, and Mr. Allenberg, secretary for the plaintiff, and that as a result of that conversation it came distinctly to the memory of the witness that at one time in particular, taking a walk up the road leading from the Rossiter House to the divide, the first year the Altoona Co. worked the witness' ground, he passed the pipe and water running from the Boston Ditch into it. That the first year the pipe lay on the south slope of the north hillside of the gulch above Rossiter's House, running north towards the Boston Ditch. That it was a line of black heavy pipe 200 or 250 feet long. That he remem-

bers seeing it running into the bulkhead. That that was in the year 1881.

Louis N. Girard, was called as a witness for plaintiff, and from him plaintiff elicited testimony tending to prove: That he knew the Altoona Quicksilver Mining Co's properties. That he first went there in 1879, late in December, and remained in the Cinnabar Mining District off and on until a year ago. That he remained at the Altoona Mine off and on until 1888, in the fall. That he was in the employ of the Altoona Company and Mr. Lytle and Mr. Loring, from 1880 to 1888, and also worked for Mr. Loring. That in the year 1884, witness was the manager or superintendent of the mines of the plaintiff in Cinnabar District. That in 1884, witness used water for mining purposes on the Altoona Mine through a hydraulic pipe, which came from the Altoona Ditch, and did sluicing also on the Trinity Claim of the Altoona Mine from March 2nd, until the last of July. That, in 1884, the witness and another man cleaned the Boston Ditch the full length. That it was in September, 1884, about the 10th, that he commenced it, and the work was completed about the last of September. That he had a man twelve or thirteen days helping him, besides working himself. That in 1885, he was still manager for plaintiff. That he mined and used water that year the same as in 1884, and from the Altoona Ditch. That March 14, 1885, he wrote to Mr. Allenberg: "I will have the pipe running in three days. Water will not last long unless we get a wet spring. The snow all gone. Cannot work from the upper ditch;" no water, so I will do the best I can from the lower ditch. That he

mined that year and used the water until June 12th. I think the water lasted about three months. That he had no use for the Boston Ditch in 1885. That he had no intention of using the water of the upper ditch that season. That in 1886, he had charge of the Altoona mining properties. That he kept the Altoona Ditch in repair that season. That in the year 1887, he was still in the same position, taking care of the properties of the Altoona Company. During the examination of this witness, counsel for defendant objected to certain evidence on the ground that it was immaterial.

Counsel for plaintiff stated: They have denied that we owned, or ever owned, either the Altoona Ditch or water right, and denied that we had any right to divert any water through the Altoona Ditch. That is in the pleadings.

The Court. That is not in the statement of counsel. Mr. Campbell's statement before the Court and jury was clear, and I think he made no controversy about the Altoona Ditch.

Mr. Campbell (of counsel for defendant). I do not make any contention over their right to the Altoona Ditch. I simply say we do not deprive them of the water which they are entitled to have run down it.

Mr. Cross (of counsel for plaintiff). I suppose we try the case on the issues made in the answer.

The Court. Oh, no. That is entirely a fallacy. Counsel can get up and abandon his answer. When he does, the case is tried on his admission.

At this stage, counsel for plaintiff asked of the witness the following question:

"During the year 1886, did you make any arrangement for the company with the Butlers in regard to the use of the water of the Boston Ditch?"

This question was objected to by counsel for defendant as irrelevant, immaterial, and incompetent; which objection was overruled by the Court; to which ruling of the Court the defendant by its counsel then and there duly excepted.

The witness answered to this question: "I let Mr. Butler use the water for the repairing of the ditch, keeping it up in repair; he agreed to put the ditch in repair for the use of the water. I made that arrangement in the interest of the Altoona Quicksilver Mining Co., as its representative."

Witness further continuing, plaintiff elicited evidence from him tending to prove: That no mining whatever was done on the Altoona in 1887; but he kept the Altoona Ditch in repair and took care of the Altoona property. That the witness was there in 1888 as representative of the Altoona Company. During that year, as representative of the Altoona Company, he rented the water from the Altoona Ditch to a Mr. Tisher for $5.00 a month, who used the water mining that year, sluicing and hydraulicing on the west side of the Altoona Mine, on the El Madre Claim, which was the same ground as the Davis Claim, and that Mr. Robinson and the two Butlers worked with Tisher on those mining operations. That the water used by them ran through the Altoona Ditch. That witness ceased to be in the employ of

plaintiff about July or August, 1888. That while the witness was agent and manager of the plaintiff, he was employed to take care of the Altoona Mine and the Trinity Mine and the Altoona Ditch. That as to the Boston Ditch he had no instructions. That when he had the men working on the Boston Ditch, he did so because he supposed it belonged to the company, and because they had used it in 1880, and he was under the impression that the Altoona Company owned the ditch. That he knew that it was his business to look after all the property which the Altoona Company owned or claimed there.

On cross-examination of said witness, the defendant elicited testimony tending to prove: That he received his instructions as to what property to look after from Mr. Crandall. That he was not employed on behalf of the company by Mr. Crandall, but was employed by Mr. Loring. That it was before he was employed by Mr. Loring that Mr. Crandall gave him the instructions. All that Crandall told him was what property the Altoona owned there, namely, the Altoona Ditch and the Altoona Mine and the Trinity Mine. That when he served notice on Butler to cease using water of Boston Ditch, he did it on his own responsibility, on the assumption that the Altoona Company owned it. That he was on the Altoona Company's property during the mining seasons of 1880, 1881, 1882, 1883, and up to 1888. That he knew the Boston Ditch perfectly well. That he knew it from the Boston Mine down to the end of the Boston Ditch. That the only year during that time when any water ran through the Bos-

ton Ditch down to the Altoona Mine, to my recollection, was in the year 1880, when it was used on the Loring Claim, which at that time was called the Davis Claim. That during the whole time witness was there no water was ever used from the Boston Ditch for mining on the Altoona or Trinity claims to his recollection. That all the water used on those claims was from the Altoona Ditch and no other source. That in the years 1886, 1887, and 1888 there was no mining done of any consequence on the Altoona property. That in the year 1888, when he left there, no living man could have got water through the whole length of the Boston Ditch from the Boston Mine down to the Altoona. That the ditch was filled up and caved in, filled with dirt, rocks, and brush. That it was not possible, when he left there in 1888, to run water through that ditch from the Boston Mine to the Altoona end of the ditch. That in 1885 the, witness as manager of the Altoona Company, had no intention to use the Boston Ditch, because I had no use for it, and because the Altoona Ditch answered better, because the water lasted longer. That in the years 1883, 1884, and 1885 there was water used on the Loring Claim that came from the Altoona Ditch. I did not come up to the mine in 1883 until after they got through sluicing. I came there then and did the retorting. It was some time in July or August when I came there. I went to retorting cinnabar taken out by the company, and Mr. Loring also. Mr. Loring had got through with his washing for the year when I got there. Previous to that I had been there about three days that year, some time in May. The Altoona Ditch was extended on to the divide in

such a way that the water would run on the claims on both sides of the divide, in the spring of 1883. I first saw it when I went there in May, around on the west side of the hill. I saw the pipe line there in 1883. When I said the Boston Ditch was filled up from the Boston Mine down to the lower end, I mean it was filled up like any other ditch. That it was not kept in order. The bank washes down and the rocks and leaves and brush come right in the ditch. There is a great deal of snow up in that country in the winter. When the snow melts there are rivulets of water running down over the banks into the ditch, and in those places there would be rocks and dirt washed down into the ditch. There were no places where any snow slide would cave in the sides of the ditch. The ditch ran through a timbered country. The brush were those that grew along the ditch, and limbs that fell into the ditch. A ditch there needs to be cleaned out every spring to keep it in order. I don't think they could have got water through that part of the ditch without cleaning it out. After 1883 the water was used on the Loring Claim from the Altoona Ditch by Mr. Tisher and Mr. Robinson, and Charles M. Butler and M. D. Butler. That they got the water from witness, as manager of the Altoona Company. That in 1883, 1884, and 1885 no water was put upon the Loring Claim from the Boston Ditch.

On re-direct examination of said witness, plaintiff elicited testimony tending to prove that the extension of the Altoona Ditch over to the Loring Claim was dug before the witness was in there. That the witness did not see any water in the lower portion of the Boston Ditch while he was

there. That before 1883 it was very easy to use water from the Altoona Ditch on the Loring Claim. That the Altoona Ditch was extended to the divide, long before the time of the witness there. That it was extended so as to cross the divide some time in the 70's, so that it was clear across the divide. That in 1888, the Boston Ditch from the Boston Mine westward, was all filled up, because it was not kept in order. That it was caved in all the way, and filled with rocks and dirt, in some places it was even full. That a ditch in that country has to be cleared out every spring to keep it in order, so as to run the water through it. That the witness walked along ditch, time and time again, from the Boston Mine down to the Altoona. That in 1888, there were no places where the water could run at all. That there were not any stretches of from a quarter to half a mile, where the ditch was in reasonably good repair. That in 1891, the witness commenced work for the Integral Company. That he worked for them until about April, 1894. That he was present in 1892, when Mr. McCaw put up a notice at the upper end of the Boston Ditch on Crow Creek. That witness was in the employ of the Integral Company, of which Mr. McCaw was superintendent.

Plaintiff called Charles D. Rhodes as a witness, who testified that he was at present chief draughtsman in the United States Surveyor General's office, for the State of California. He presented a map of Township 38 North, Range 6 West, Mount Diablo Base and Meridian, and stated it was an original document on file in the United States Surveyor General's office for California.

That that township was sectionized by the United States Government as follows: The survey was completed July 20, 1880. The survey was approved by the United States Surveyor General, for the State of California, March 1, 1881, and that the approved plat was filed in the United States Land Office at Redding, July 9, 1881.

C. M. Butler, witness, called for plaintiff. On examination of said witness, plaintiff elicited evidence tending to prove: That he knew the Altoona and Trinity Quicksilver mining claims, in Cinnabar District, Trinity county. That he knows the Altoona and Boston ditches. That he was first there in 1875. That the Altoona Company was working both the Altoona and Trinity claims. That witness was there in 1876, and that he knew of his father, M. D. Butler, commencing to dig the Boston Ditch. That he was there when the Boston Company commenced to work the Boston Mine. That they used the water of the Boston Ditch on the Boston Mine in 1877. That he left there in 1877, and was back in 1879, and then was back again in 1883, August 13th, at the time his father relocated the Boston Mine. That it was about August 13th, 1883 that he was there. That he remained a couple of weeks. His father, M. D. Butler, left at the same time he did. That he next returned in 1885, in the spring. He was out and in that district several times that season. That nobody was working on the Altoona when he was there that year. That Louis Girard was in charge of the Altoona. That no work was done to his knowledge on the Loring Claim in

1885. He was in the vicinity of that claim, but he did not look at it in particular. That his father was there with him during that year and left when he did, and they returned early the next spring. That he was there in 1886 and 1887. That in 1887 he used water sluicing on the Boston Mine from the Boston Ditch. That there was no time in 1887 or 1888 when the Boston Ditch down to the Boston Mine did not get water, and he sluiced with the water at the Boston Mine. They used the ditch full until the water got light, and as long as there was sufficient water to mine with. That he and his father were partners. That he did not use any water on the Boston Mine in 1888. We mined, hydraulicing and sluicing, there on the Boston Mine three years. That some was used on the El Madre Mine from the Altoona Ditch. That in 1889 water was used on the Boston Mine out of the Boston Ditch. That in 1886 and 1887 Mr. Girard was in charge of the Altoona mines, but I did not see him do any work on the mine. During those years I was only at the Altoona Mines just a few times. That Girard had a little garden which he irrigated through the Altoona Ditch. That after his father, M. D. Butler, took charge of the Altoona Company's properties in 1889, that they sluiced and concentrated ore on the Altoona Company's mines with water from the Altoona Ditch every year. That during those years, whenever he saw the Altoona Ditch, water was running in it.

On cross-examination of said witness, defendant elicited testimony tending to prove: That when he and his father went there in 1885, they had to do some work on the

Boston Ditch before they could get the water through it. Had to roll out some logs, take out a good many rocks, and loose dirt that had flowed into it, and there was a break or two in the bank of the ditch. That in 1888 he worked on the Loring Claim with water from the Altoona Ditch. That in no year that he was there did he know, of his own knowledge, of any water being used on the Loring Claim from the Boston Ditch. That in 1876 or 1877 no water was run through the Boston Ditch between the Boston Mine and the Altoona Mine or Trinity Mine or Loring Claim. That in those years he was working on the Altoona Mine, perhaps three hundred yards from the Boston Ditch. He did not notice the Boston Ditch in 1883 or in 1885 between the Boston Mine and the Altoona Mine. That the witness never knew of any water ever having run through the Boston Ditch from the Boston Mine to the Loring Claim. That the Loring Claim in 1888 was called the El Madre. That the witness noticed the Boston Ditch in 1886, 1887, 1889, 1890, 1891, 1892, 1893, and 1894. That in those years, when he noticed the Boston Ditch, he did not see any water running in it, from the Boston Mine down towards the reservoir or towards the Trinity Mine. That from 1887 to 1891 the ditch was filled up with rocks and limbs in places between the Boston Mine and the reservoir, and that one place was level with the surrounding ground for eight or ten feet, he guessed. That there was one place, to his knowledge, where little streams had come down and washed down both banks of the ditch. The little place that was level, there was an opening there, where the ditch was sluiced

away. That he never noticed any place in the ditch where logs were covered up. That in 1885 the ditch was in pretty good shape for quite a distance, but they ran no water through it. That the witness would have known it had they run water through it below the Boston Mine. The finding of a log in a ditch in that country is not unusual. It is a timbered country. The rocks that were in the Boston Ditch caved in from the sides of the ditch in places from the top of the bank, and in other places they came out of the bank of the ditch. The limbs and rocks were rolled in by the snow melting. The place that I spoke of, where it looked as though the lower bank had been sluiced away, it looks as if the ditch was full of water, and broke away the side of the bank, and caused the water to turn down. The ditch bank there is gone only for a few feet. We brought some water around there a good many years ago, to that point, and did not bring it any further. I won't be positive but that we turned the water out there some place, where the ditch was filled up, and in order to do that we would have to cut through the ditch. I don't remember that I cut it, but somebody did cut it. I think that is the way it happened. It was in 1885 that we run the water around to there in the Boston Ditch. In 1885 myself and my father done some work cleaning out the upper portion of the Boston Ditch. We had to clean it out again in the springs of 1886 and 1887, because it fills up, and you have to work on the ditches every spring to run the water through. Where that ditch runs, some portion of the country lies at an angle of about 45 degrees, and in other places it is

quite flat; down to as low as 80 degrees in some places. There are places where it is steeper than 45 degrees. The place where I say the ditch was filled up in 1892, for 7 or 8 feet, is where the wagon road crosses, going from the Boston Mine to the Altoona Mine. It is filled up the width of the road. At that place, there was formerly a bridge to drive over the ditch. When we cleaned out the Boston Ditch, in the springs of 1886 and 1887, we had to take logs out of the ditch, and roll rocks out of it, and use a pick and shovel, and crowbar, and an axe, and saw, to put it in shape. Trees would fall down in the winter with the snow, and we had to use a pick and shovel, and crowbar, every season. The place where the ditch bank was broken, that we took the water to in 1885, we did n't take it any further, because we had no use for it. We talked of sluicing there, and I think there was some words about the water, it seems to me. I did n't have the words myself. The water would not run any further at that time without doing some work cleaning out the ditch.

Charles Allenberg, witness called for plaintiff.

Plaintiff elicited testimony from this witness tending to prove: That he kept the accounts for the plaintiff ever since the plaintiff was organized; that he first visited the Altoona Mine in 1875, in June—next in July, 1877; that when he visited the mines in 1875, Messrs. Lytle and Hawkett were in possession of the Altoona Mines; that when he visited the mines in 1877, the Altoona Quicksilver Mining Co. was in possession; that the witness next visited the mine in July, 1878, and then in

June, 1879, and then in October, 1894; at which times the Altoona Quicksilver Mining Co. was in possession of the mines; that in 1877 the company was using water for sluicing and hydraulicing and concentrating ores, and the same in 1878; that the witness was secretary of the plaintiff; that in 1878 he visited the Boston Mine, and that the Altoona Company was then working the Boston Mine in 1878, using water there.

The following questions at this point were asked the witness:

Question. What water were they using?

To which question the witness replied: I do not know of my own knowledge what water they were using, but there was some water there, and it must have been from the Boston Ditch.

Question. Was there any other way of getting water at that time except through the Boston Ditch?

Answer. Not to my knowledge.

Mr. Campbell, counsel for defendant. I object to that; that is an argument of the witness.

Objection overruled by the Court, to which ruling counsel for defendant then and there duly excepted.

The evidence from said witness further tended to prove that when he visited the mine in 1879 the Altoona Company was sluicing and concentrating by the hydraulic process. That from the organization of the Altoona Company to the present time there have always been three directors—Mr. Jacob Frowenfeldt, William Goldstein, and the witness. That Mr. William Goldstein is a cousin of the witness' wife. That Mr. Jacob Frowenfeldt is a cousin of the witness' wife. That for

a few years Mr. M. Zellerbach was a director, and for some years Mr. Greenman and E. L. Goldstein. That E. L. Goldstein became president of the company in 1879, and remained president until his death, in 1892. That the directors had their principal place of business since 1879, one year at 421 and 423 Market St., and subsequently at 630 Brannan St., San Francisco, which latter place continued to be the office of those gentlemen until April 1st, 1895. That witness had been the general manager of the affairs of the corporation during recent years, since 1877.

At this point the following question was asked the witness by plaintiff:

During that time what has been your intention as the general manager of the corporation with regard to holding the corporation's rights to these ditches and water rights?

Which question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent.

The objection was overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted.

To which question the witness answered: Always intended to hold our rights to those ditches.

Question by Plaintiff. In the same connection, what has been the intention with regard to the Boston Ditch and the water right used with the Boston Ditch since the date of the deed from the Boston Company to the Altoona Company in 1877?

To which question counsel for defendant objected, on the ground that the same was immaterial, irrelevant,

and incompetent, which objection was overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted.

To this question the witness answered: Always intended to hold our right to the ditch and the water right.

Question by Plaintiff. And what in the same connection with regard to the Altoona Ditch and the right to divert water through it?

Same objection, ruling, and exception.

Answer. The same.

Question by Plaintiff. What use could be made of the water through the Altoona and Boston ditches for the purposes of that company other than what it has actually been appropriated to?

Objected to by counsel for defendant on the ground that it was irrelevant, immaterial, and incompetent, and purely speculative.

Objection overruled by the Court, to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

To this question the witness answered: Heretofore we have used the water for hydraulicing and sluicing. At present we could use the water for our boilers and condensers also could use it for getting water power to operate our condensers.

Mr. Campbell. I move to strike out the answer of the witness as to what they have done, as not responsive to the question.

The Court. That is not responsive. Strike it out.

Mr. Cross. When he says heretofore it has been used for one purpose—

The Court. You can ask it over. The best rule is to compel the witness to respond directly to the question.

Mr. Cross. Q. Answer the question again, Mr. Allenberg, and make the answer a little more direct. You stated what it had been used for, while the question is what it can be used for.

Answer. We could use the water for water power, to run our machinery by water power.

Question. Why has not the company done so heretofore?

Same objection, ruling, and exception.

Answer. Have not been able to use the lower end of the Boston Ditch, which would give us sufficient power, to get water power for our machinery, to move our machinery.

Question. What advantages would you have as to power when you could bring the water through the Boston Ditch over what you would have in bringing the water through the Altoona Ditch?

Same objection, ruling, and exception.

Answer. The difference in the elevation could get so much more power through the Boston Ditch than through the Altoona Ditch; the higher elevation gives more pressure.

Question. What benefits would accrue to the company from using this water for power over obtaining power by other means which could be used?

Same objection, ruling, and exception.

Answer. It would save us from using steam power, and, consequently, save a good deal of wood to make steam for the boilers. It would also save an engineer.

Question. How much expense per month would it save the company during such months as it would furnish power?

Same objection, ruling, and exception.

Answer. It would save some $600 per month during such time as we had the water power.

The counsel for the defendant moved to strike out the answer. Motion denied. To which ruling the counsel for defendant then and there duly excepted.

Question. Did you see Mr. M. D. Butler in this city during the years 1886 and 1887, from time to time?

Answer. Yes, sir; at my office, on Brannan St.

Question. Did you have any conversation with him at those times with regard to the use of the Boston Ditch and the water there?

Question objected to by defendant as incompetent, irrelevant, and immaterial. Objection overruled, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Answer. Mr. Butler came to me on several occasions and asked me for the use of the water, for sluicing boxes, and some for iron pipes; and I always gave him permission to use our water for sluice boxes or iron pipes. He wanted to use the water on the Boston mines, and naturally wanted to use the water of the Boston Ditch. That was the only ditch that would carry the water on that mine, so far as I know.

Counsel for plaintiff then offered in evidence the patent of the United States to the Altoona Quicksilver Mining Co. for the Altoona Quicksilver Mining Claims, dated June 21st, 1895; which patent was objected to by defendant as immaterial, irrelevant, and incompetent, and as having been issued subsequent to the commencement of this action. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Said patent was then introduced in evidence, and reads as follows:

"General Land Office. Mineral Certificate.
"No. 25728. No. 301.

"THE UNITED STATES OF AMERICA.

"To all to whom these presents shall come, GREETING:

"*Whereas*, in pursuance of the provisions of the Re-
"vised Statutes of the United States, chapter six,
"title thirty-two, and legislation supplemental thereto,
"there have been deposited in the General Land Office
"of the United States the Plat and Field Notes of
"Survey and the Certificate, No. 301, of the Register
"of the Land Office at Redding, in the State of Cali-
"fornia, accompanied by other evidence, whereby it ap-
"pears that the Altoona Quicksilver Mining Company
"did, on the twenty-fourth day of August, A. D. 1894,
"duly enter and pay for that certain mining claim or
'premises known as the Altoona Quicksilver Lode
"Mining Claim, designated by the Surveyor General as

"Lot No. 42, embracing a portion of Section 22 in "Township 38 North of Range six West, Mount Diablo "Meridian, in the Cinnabar Mining District, in the "County of Trinity, and State of California, in the dis- "trict of lands subject to sale at Redding, and bounded, "described, and platted as follows, with magnetic varia- "tions, eighteen degrees and fifteen minutes east.

"Beginning at the northeast corner of claim, a ser- "pentine rock 13x9x5 inches, marked A. & T.

"Thence, first course, south nine chains and nine links "to the southeast corner of claim, a granite rock 26x10 "x8 inches, marked A.

"Thence, second course, west twenty-two chains and "seventy-three links to the southwest corner of claim, a "serpentine rock 10x13x5 inches, marked A, from "which Mt. Desert rock bears south eighty-eight de- "grees and thirty minutes east, about three hundred "and sixty chains distant.

"Thence, third course, north nine chains and nine "links to the northwest corner of claim, a serpentine "rock 30x20x12 inches, marked T & A, from which a "pine forty inches in diameter bears north forty-two "degrees east thirty-nine links distant, a pine thirty "inches in diameter bears south forty-three degrees east, "eighty-five links distant; and the corner common to "sections twenty-one, twenty-two, twenty-seven, and "twenty-eight in Township thirty-eight North of Range "six West, Mount Diablo Meridian, bears south twenty- "nine degrees, eight minutes and twenty-five seconds "west, thirty-three chains and fourteen links distant.

"Thence, fourth course, east twenty-two chains and "seventy-three links to the northeast corner of claim, "the place of beginning; said lot No. 42 extending one "thousand five hundred feet in length along said Altoona "quicksilver vein or lode, and containing twenty acres "and sixty-six hundredths of an acre of land more or "less.

"Now know ye, that there is therefore hereby "granted by the United States unto the said the "Altoona Quicksilver Mining Company, and to its suc- "cessors and assigns, the said mining premises hereinbe- "fore described, and not especially excepted from these "presents, and all that portion of the said Altoona quick- "silver vein, lode, or ledge, and of all other veins, lodes, "and ledges, throughout their entire depth, the tops or "apexes of which lie inside of the surface boundary line "of said granted premises in said Lot No. 42, extended "downward vertically, although such veins, lodes, "or ledges in their downward course may so far depart "from a perpendicular so as to extend outside the ver- "tical side lines of said premises; provided, that the "right of possession to such outside parts of said veins, "lodes, or ledges shall be confined to such portions "thereof as lie between vertical planes drawn down- "ward through the end lines of said lot No. 42, so con- "tinued in their own direction that such planes will "intersect such exterior parts of said veins, lodes, or "ledges; and, provided further, that nothing herein con- "tained shall authorize the grantee herein to enter upon "the *surface* of the plane owned or possessed by an- "other.

"To have and to hold said mining premises, together "with all the rights, privileges, immunities, and appur- "tenances of whatsoever nature thereunto belonging "unto the said grantee above named, and to its suc- "cessors and assigns forever; subject, nevertheless, to the "above mentioned and to the following conditions and "stipulations:

"*First.* That the premises hereby granted, *with the* "*exception of the surface*, may be entered by the pro- "prietor of any other vein, to penetrate, intersect, or "extend into said premises, for the purpose of extract- "ing and removing the ore from such other vein, lode, "or ledge.

"*Second.* That the premises hereby granted shall be "held subject to any vested and accrued water rights "for mining, agricultural, manufacturing, or other pur- "poses, and rights to ditches and reservoirs used in con- "nection with such water rights as may be recognized "and acknowledged by the local laws, customs, and de- "cisions of courts.

"*Third.* That in the absence of necessary legislation "by Congress the Legislature of California may provide "rules for working the mining claim or premises hereby "granted, involving instruments, drainage, and other "necessary means to its complete development.

"In testimony whereof, I, Grover Cleveland, Presi- "dent of the United States of America, have caused "these letters to be made patent, and the seal of the "General Land Office to be hereunto affixed.

"Given under my hand at the city of Washington, the
" twenty-first day of June in the year of our
" Lord one thousand eight hundred and
[SEAL] " ninety-five, and of the Independence of the
" United States the one hundred and nine-
" teenth.

"By the President: GROVER CLEVELAND.

" By M. McKean,
" Secretary.

" L. Q. C. Lamar,
" Recorder of the General Land Office.

" Recorded Vol. 263, pages 244 to 246, inclusive."

[Endorsed]: Filed at the request of Wells, Fargo & Co., July 8th, A. D. 1895, at 20 min. past 1 P. M., in Book No. 2 Patents, page 407 Records of Trinity County. R. L. Carter, Recorder.

Plaintiff also offered in evidence a patent to the Altoona Quicksilver Mining Co., of the Trinity Quicksilver Mining Claim, situated in Section 22, Township 38 North, Range 6 west, Mount Diablo Base and Meridian, and being lot 41 of said township, identical in its terms, with the exception of the description of the property; to which patent defendant objected on the ground that it is irrelevant, immaterial, and incompetent. Objection was overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

Plaintiff further elicited evidence from the witness Allenberg tending to prove: That the taxes of the Altoona Quicksilver Mining Co. had been paid by that company for every year from August 13th, 1875, except in the

year 1889, when the assessor of Trinity County overlooked making an assessment of the property; the Altoona and Trinity claims have been assessed every year except 1889 to the Altoona Company since August 13, 1875. That from the date of the incorporation of the Altoona Quicksilver Mining Co. to the present day some one representing that company has been present all the time at the Altoona Mines and in charge of the Altoona Mines and the property of the company. The Altoona and Trinity Quicksilver Mines had not been worked out in 1885. That the steam hoisting and pumping works and the reduction works which are now on that property were built in 1894. That they were commenced about June, 1894, and completed about December, 1894.

Question. What amount of quicksilver has the mine produced since that time—since you commenced putting up those works, which you say you commenced putting up about a year ago?

Objected to as immaterial, irrelevant, and incompetent, and referring to matters occurring since the commencement of this cause. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Answer. About $71,000 worth.

Question. To what depth has the mine been worked?

Objected to as immaterial, irrelevant, and incompetent. Objection overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Answer. Two hundred and thirty-one and a half feet.

Question. What is and has been the intention of the company and of yourself, as general manager of the company, with regard to the working and development of that mine since the year 1880?

Objected to as irrelevant, immaterial, and incompetent. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Answer. Since 1880 we contemplated to work the mine as we are doing now, but we were unable to do so until last year on account of litigation between the stockholders of the Altoona Quicksilver Mining Co.

Mr. Campbell, Counsel for Defendant. I move to strike that answer out. Motion denied by the Court; to which ruling counsel for defendant then and there duly excepted.

Witness continuing, plaintiff elicited testimony tending to prove: That prior to the commencement of this suit the Altoona Mine was worked to about a depth of 125 feet. That the body of quicksilver ore above that depth had been taken out. The last time I was up there in 1879 the mine looked very well, and the ore showed the whole length of the distance in the drifts and tunnels which were run at that time for about four hundred feet in length, and there was evidence of its going still deeper down. All the ore that I saw there was very good ore.

Question. What amount of money was expended by the Altoona Quicksilver Mining Co. in the operation and development of its properties in the Cinnabar Mining District in Trinity County, California, from the

time the company took possession of the property up to the commencement of this suit?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection was overruled by the Court; to which ruling counsel for defendant then and there duly excepted.

Answer. About $257,000.

On cross-examination witness stated: That he could not tell how much of that money was spent on the Trinity Mine, or Altoona Mine, or Boston Ditch, or Altoona Ditch. That there were no segregated accounts kept in the books of the ditch. That he could not tell how much was spent on the Boston Ditch. That he does not know whether a dollar has been spent on the Boston Ditch since 1885 to his personal knowledge. That he only knows it by the reports of the superintendents. That he does know that the company spent some of that money on the Boston Ditch in 1878. That since 1885 the superintendents reported to him that they were cleaning out the Boston Ditch and putting it in repair. That Mr. Butler so reported in 1889. That of the $257,000 he did not know of his personal knowledge whether any was spent on the Boston Ditch.

Question by Plaintiff. Who paid the money?

Answer. The Altoona Quicksilver Mining Co.

Question. What did you have to do with it personally?

Answer. I was secretary for awhile, and paid out the drafts as they came into the office from the mine, and sent money to the mine to pay the indebtedness for labor performed up there at that property.

Mr. Campbell, for Defendant. I move to strike it out. He don't know what it was paid for.

Pending the decision of this motion, the witness testified that the superintendent drew the drafts on the company in San Francisco, to pay for the labor performed up there, and at the same time made requisition for money to be sent up, to pay for things also. Might be some in money and some in drafts, and all those were paid by him, except when he was absent from the city. That he could not testify what portion of that money was paid out when he was absent from the city. It was what might happen to come in, a small amount or a large amount, during my absence from the city. That he kept the books and accounts of the company. That the total time he was absent from the city during those eighteen years, could not exceed five or six months.

Motion denied. To which ruling of the Court, counsel for defendant then and there duly excepted.

On cross-examination, testimony was elicited from the said witness tending to prove that they worked the Boston Mine in 1878. That he saw the water being used at the Boston Mine in 1878, from the Boston Ditch. That the Altoona Mining Co., extended the Boston Ditch from the Boston Mine down to the reservoir in 1878. That it was reported to him by the superintendent, Mr. Crandall, by letter, that the waters of the Boston Ditch were being used on the Trinity or Altoona claims. That Mr. Crandall became superintendent for the Altoona company December 1, 1878, and served until June 1, 1880. That the Altoona Mining Co. had nothing to do with the Bos-

ton Mine since 1878. That the company intended to claim the Boston Ditch ever since 1878, especially for the purpose of putting on water power at the mine. That he then talked with Mr. Lawrence, the superintendent, about it, but they were not in a position to operate the mines during those years on account of the litigation among the stockholders of the Altoona Company. That at the time this suit was commenced in 1893, witness had no doubt about the right of the Altoona Co. to the water in the Boston Ditch. That the putting in of the steam power since the commencement of the suit cost about $50,000. That he never had a survey made of the Boston Ditch until after this suit was commenced. That he never had any measurements taken in relation to the fall of water in that ditch till after the commencement of this action. That he never had any estimate of the amount of water that could be gotten through the Boston Ditch at different seasons of the year. That the witness did not know when on the stand whether a large or small amount of water could be gotten through there. That he never made any efforts to ascertain whether sufficient water could be gotten through there to turn the machinery or not. He knew they could use it for power. He also knew they could get enough for water power. He knew that the ditch was there, and that the water could be got through, but he never knew how much of a head they could get. That he knew they could get through it again; that it was reported to him that the water was got through; that their claim to the property was not made for the purpose of keeping other people off, but for their

own purposes, and to get water there to run the mine: that all that he ever did in relation to the Boston Ditch since 1878 was simply to claim it and think that at some time he would use it for power; that he never knew how much of a head could be got through the Boston Ditch: that since 1878 he never tried to get any water through the Boston Ditch down to the Altoona Mine. That the witness never saw the Boston Ditch until 1894. That in that year he found the Boston Ditch below the Boston Mine pretty well filled up, rocky in places, trees across, and generally in a bad condition. That the water would not run through it from the Boston Mine down to the Altoona Mine at that time. That there never was any resolution appointing him manager of the Altoona Co. That he was manager merely by general consent of the directors. That when witness stated in his direct examination that they had not previously used the water for water power to run their machinery by water power, because they had not been able to use the lower end of the Boston Ditch, which would give them sufficient power to get water power to move their machinery, what he meant was that inasmuch as the Integral Company had deprived them of Boston Ditch, they could not certainly make use of the lower end of the Boston Ditch, that is, from the Integral Mine down to the Altoona Mine. That the Integral Company taking away the Boston Ditch from us, and not being able to get the water through the Boston Ditch, they could not get the water from the head of the ditch down to the Altoona Mine for the purpose of getting water to run their machinery with. The Integral

works are near the Boston Ditch, between the head of the ditch and the Altoona Company's mines; and when the Integral Company takes the water and uses it from the Boston Ditch it does not run through the lower part of the Boston Ditch, and the Altoona Company cannot get it.

J H. Cox, witness, recalled for cross-examination, and on cross-examination defendant elicited facts tending to show that while he was superintendent of the Altoona Co. they had all the water from the Altoona Ditch that they wanted, that is, all that was necessary to run the mines in the way in which they were then running them; that is, sufficient water for steam and condensation. I mean we can get along by operating that mine with steam and by using what water we have got there, and that the amount of water was the amount of water which ran through the boxes which had been built there.

John H. Carter, witness, was called for defendant, and from said witness defendant elicited evidence tending to prove: That he first went to live in the Cinnabar Mining District in 1878, and remained there for a year. That he next went there in June, 1892. That in 1878, when he was there, he was over the Boston Ditch. That when witness first went to the Cinnabar District in 1878 no water was running through the Boston Ditch. That when he first went there in 1892 no water was running through the Boston Ditch. That in 1892 the Boston Ditch from the Boston Mine up to Wiltz Gulch was considerably out of repair. That there were rocks

in it and logs in the ditch, and in some places earth had slid in. That that was before the ditch was cleaned out in 1892. That before it was cleaned out in 1892 it was impossible to run water through the Boston Ditch from Wiltz Gulch to the Boston Mine. The water was turned into the ditch before the furnace was built in 1892. I think it was in July. I will not be positive. That he is familiar with the Boston Ditch from the Boston Mine westward to the reservoir That he worked right around the ditch and over it for two years, working right near it. He was cutting timber for the sawmill of the Integral Company. That in 1878 it was in pretty fair condition, and would probably carry water by looking after it. That no water passed through it in 1878 or in 1879 to his knowledge. That he does not know whether any water was run through it in 1879 or not. That in 1892 that portion of the ditch was in bad condition, filled with rocks, logs, and brush, the banks caved in.

Here defendant's counsel shows to the witness three photographs, marked, respectively, "Defendant's F, G, & H. Witness testifies that the photographs correctly represent certain portions of the ground over which the Boston Ditch ran, and that the photographs were taken August 14, 1894. The witness marks certain places upon photographs at request of defendant's counsel, indicating the line of the ditch on the photographs as near as he knew it. That since he knew the Boston Ditch no water flowed through it to his knowledge from the Boston Mine to the reservoir. That no water ran in that portion of the ditch in 1892,

or 1893, or 1894, but water did run from the head of the ditch to the Boston Mine, through the Boston Ditch in 1892 and 1893, to the witness' knowledge. That in those years the ditch was not in condition to have water run through it.

On cross-examination of the said witness, plaintiff elicited testimony tending to prove: That in 1878 the witness went there on December 1st. I might probably be mistaken about the year I was there. I think I am sure what year I went there, but I might be wrong. Mr. Crandall had just taken charge of the mine. When he went there it was not a time of year when there would have been water in the ditches to any extent, and that it was not strange that he did not then see any water running in the Boston Ditch. That in 1879 he crossed the Boston Ditch a great many times. That he was there in 1879 until some time in November or December. That he knew the Loring Claim and the Trinity Claim. That he does not know that in 1879 Mr. Crandall worked on the lower end of the Loring Claim, and the upper end of the Trinity Claim, with water from the Boston Ditch. That if he did, it was not while witness was there. That witness left in the fore part of the winter. That he is not positive but that it was 1879 that he went there, and 1880 when he left. That he has never freshened his memory of the thing at all, and it was years ago, and it cut no figure with him particularly that he knew of. Witness testified that he saw defendant's Exhibit B. That Mr. Simpson, the manager of the Integral Mine took it. That when witness was in the vicinity of the Boston Mine in 1892, 1893, and 1894, he was

working for the Integral Company, cutting timber. That he cut timber between the Integral Mine and the reservoir, in the two seasons of 1892 and 1893. That a great deal of the timber he cut above the ditch. That there has been cut there probably 200,000 feet of logs above the ditch. When I went there, there had been a great deal of timber cut above the ditch. There was lots of fallen timber both above and below the Boston Ditch, on the hillside. All the logs that were cut there in 1892 and 1893, were hauled to to the mill to make lumber—all that was fit for lumber. The rest was left on the ground on the hillsides. That it is not strange that there were some logs in the ditch in 1894. In cutting timber we cut off a great many limbs and boughs, and they were left on the ground on the sidehill above the ditch. That the day the photographs were taken, the Boston Ditch was taking water from Wiltz Gulch. That he did not see the ditch above the Wiltz Gulch on that day. That the water was running in the ditch four or five inches deep, and about eighteen inches wide. On that day the Altoona Ditch was getting more water than was running in the Boston Ditch. That in 1892 the witness first went to the Integral Mine, in May, and stayed one day and one night. He did not go to the Boston Ditch at that time. That he has no recollection of seeing the Boston Ditch at that time. He went back there on the 20th of June, 1892, and remained there. He was at the mine when the Integral Company turned the water into its ditch in 1892. They were hurrying to get up a sawmill, and as quick as the mill was up the water was

turned in to carry the sawdust off. I think the water might have been in the ditch before we used it at the mill. I cannot say. I think the water came down to the sawmill first some time in July. I went along the Boston Ditch from the Boston Mine to Wiltz Gulch some time between the 20th of June and the last of July. The ditch had not been cleaned out at that time. That while witness was cutting timber there above the Boston Ditch in the year 1892 and 1893 he rolled one log into the ditch, but it was taken away. That probably other logs rolled into it during that time when the teamsters came around to haul out logs. The teamsters may have got logs in and taken them out again. That he saw Mr. Simpson take the photograph marked defendant's Exhibit F, and recognizes the place where it was taken. That witness came up just as Mr. Simpson set his instrument for taking a picture. Simpson took it, and they looked at the negative and passed on. That the ditch was on a grade there of 16 or 18 inches to the rod, and runs down a steep place just above the reservoir. You could see where the water had cut down to the bedrock. You could see the bedrock there where the water had run in the ditch. That possibly there is no place represented in the picture where the bedrock could not be seen in the bottom of the ditch. I think there was a place there where the ditch had overflowed its banks. The reservoir is constructed in a flat, and has an outlet at the lower end. The place where the ditch is shown on the photograph the ditch was a foot or a foot and a half deep and two

or three feet wide. That the ditch is running down the hill with a steep grade. The next exhibit represents the ditch between the reservoir and the Boston Mine, where it runs down a hill with a grade of about one-eighth pitch. It was a natural depression where the ditch runs in that picture and didn't need much digging to make the water run there. A natural depression on the side of the hill was almost sufficient. Witness shows where the ditch runs on the exhibit. The ditch was about two feet wide there and a foot deep and had a steep grade of several inches to the rod, and would carry lots of water.

Defendant called Ambrose B. McCaw, and from said witness defendant elicited testimony tending to prove, that he first went to the Cinnabar Mining District in November, 1891. That in 1892 Alexander McCaw was general manager of the Integral Quicksilver Mining Co., and he was engaged in no other business. That he was at the mine in the month of June, 1892. That the witness resided in the Cinnabar Mining District from 1891 to 1894 most of the time. That he resided at the Boston Mine. That is the same mine now operated by the Integral Company. That he is familiar with the Boston Ditch. That he first saw the Boston Ditch in 1892. That the Integral Mining Company first turned water into the Boston Ditch in July, 1892. That in 1892, 1893, and 1894, the Integral Company used water sufficient to fill up a two-inch pipe from the Boston Ditch. That was all the water they took in the season of low water, which would be in July, August, and September. That when he first saw the Boston Ditch there was a little water running through it. That he first noticed

the ditch in May and June when the snow went off. That that was about all that ran down the ditch, as no water was allowed to run to waste. Water was also run to the Integral sawmill to carry off the sawdust and feed the boilers. The water was also used to feed the engine and hoisting works, and for the condensers. The Integral Company has used the water for those purposes since in 1892. That the Integral Mining Company used no more water than that until the spring of 1895, after commencement of this action. That since 1892 no water flowed through the Boston Ditch from the Boston Mine down to the reservoir or at any time since witness has known the ditch. That no water could go through it, because it was filled up, mostly all filled up with slides.

The defendant next offered in evidence the Receiver's receipt of the United States Land Office at Redding, which reads as follows:

"RECEIVER'S RECEIPT.

"(Duplicate to be given the Purchaser).

"Mineral Entry, No. 294; Lots, "Nos. 50, 51, 52, 53 & 54. } UNITED STATES LAND OFFICE,

"at Redding, California,

"October 11th, 1893.

"Received from the Integral Quicksilver Mining Com-"pany (a corporation) by Alexander McCaw, attorney "in fact, the sum of five hundred and fifteen 00-100 "dollars, the same being payment in full for the area "embraced in that Mining Claim known as the 'Boston "'Consolidated Quicksilver Mine,' in Township No. 38

"North, of Range, No. 6 West, Mt. Diablo Meridian, "designated as lots Nos. 50, 51, 52, 53 & 54, said "Lot No. 50, extending 1494.2 feet in length along the "Boston Lode; Lot No. 51, extending 1500 feet in length "along the Elson Lode; Lot No. 52, extending 1494.2 "feet in length along the Spencer Lode; Lot No. 53, "extending 1494.2 feet in length along the Lake Lode; "and Lot No. 54, extending 1494.2 feet in length along "said the Kansas Vein or Lode. There is no lot, sur- "vey or claim to be excluded from this claim, as sur- "veyed and claimed. Said lode claim, as entered, em- "bracing 102.80 acres in the Cinnabar Mining District, "in the County of Trinity, and State of California, as "shown by the survey thereof.

"$515.00. JOHN V. SCOTT,

"Receiver."

Defendant also offered in evidence Patent of the United States to the Integral, Central, Garnet, and Ruby Lode Claims, dated the 4th day of December, 1893, which was a Patent in the usual form, by which, on the 4th day of December, 1893, the United States conveyed to the Integral Quicksilver Mining Co. that certain mining claim or premises known as the Integral Consolidated Quicksilver Mining Claim, consisting of the Integral, Central, Garnet, and Ruby Lode Claims. Said Patent contains the same granting terms, provisos, conditions and stipulations as the Patent to the Altoona Quicksilver Mining Company hereinbefore set out verbatim.

Defendant further elicited from said witness McCaw

testimony tending to prove: That he was familiar with the country in the Cinnabar Mining District. That he assisted in surveying said claims. That the claims covered by the Register's Receipt offered in evidence, are the five claims marked on defendant's map (Exhibit No. 2), as the Kansas, Lake, Spencer, Boston, and Elson claims. That the mining ground covered by the patent to the Integral Quicksilver Mining Co., are the claims marked on said map as the Integral, Central, Garnet, and Ruby claims. That the witness had theretofore seen the map, defendant's Exhibit 2. That the said map correctly delineates the various mining claims and ditches. That the map is correct. That the Boston Ditch runs through the Boston claim for about 1,500 feet. That the defendant, the Integral Quicksilver Mining Co. expended about $150,000 to $200.000 on their works. That they sunk on the Boston Mine about 280 feet. That they have hoisting works, sawmill, timber sheds, water sheds, tramway, boarding-houses, store, and miners' cabins. That the water from the Boston Ditch is absolutely necessary for the use of the Boston Mines. That the furnace of the defendant could not be run without it.

On cross-examination, the witness testified as follows: That the two-inch pipe, which he testified to in his direct examination, was two inches in circumference. (This witness testified on his direct examination that he was a mechanical engineer by profession.)

Q. What do you mean by circumference?

A. Round.

By a Juror. Q. Or through. A. Through.

Mr. Cross. Q. Which do you mean, two inches through or two inches around?

A. Two inches round.

Q. It is round, but is the pipe two inches through from one side to the other? A. Yes, sir.

Q. That is what you mean? A. Yes, sir.

Q. You are a mechanical engineer by profession?

A. Yes, sir; supposed to be.

Q. Do you know what the diameter of a pipe is?

A. I should.

Q. Which way of a pipe is the diameter; is it through it or around?

A. Well, it is around it, I believe.

Q. Now, you think it is around it. Is it around it on the inside or on the outside?

A. It is right across.

Q. On the inside or the outside?

A. On the inside, it is right across.

Q. On the inside, that is, it is two inches in the clear? A. Yes, sir; two inches in the clear.

Witness further testified that the water was taken from the Boston Ditch by means of an open flume or box eleven inches by twelve, 150 or 200 feet to the upper end of the pipe. That the grade of the flume is not quite half pitch. That the iron pipe he testified to was put in in 1892. That it runs to the furnaces. That there is another two-inch pipe that runs to the hoisting works; a pipe two inches through. That since 1892 they did not use any water at the sawmill, because they could not get enough to carry the sawdust off. That at

one time they did get water from the Boston Ditch to carry the sawdust off. That it did not go through any iron pipe, but went through a V flume. There was one pipe two inches in diameter went to the hoisting works, one pipe two inches in diameter went to the furnaces, and a V flume to the sawmill. That when he testified on his direct examination that all the water ran through a two-inch pipe, he meant in 1892. That they took the water to the sawmill in the spring of 1893. That they started the sawmill in July, 1892. That the V flume was about 8 inches by 6, with a grade of about 4 inches to the 100 feet. That the water ran through the V flume about a month in 1893, and then they could not get any more water through it. That was in August. That the pipe to the hoisting works is placed at an angle of about 35 degrees from the horizontal. That the pipe to the furnaces doesn't run as steep as quarter pitch. That the waterway running from the ditch down, since the Integral Company has been using the water, has cut a great waterway. That during the last spring they used the water from the Boston Ditch for ground sluicing, and that they were using the water at the hoisting works last week. That the works ran regularly from December, 1893, until October 1, 1894. That the hoisting works had run altogether about ten months. It is about 75 feet from the Boston Ditch down to the hoisting works on the slope. The ditch is above the hoisting works. That to witness' best judgment it is about 100 feet perpendicular from the collar of the shaft at the hoisting works to the bottom of the Boston Ditch immediately opposite. That they have to draw all of the

water out of the Boston Ditch at that place to use it, and it never gets back into the ditch again. The water was used at the hoisting works for steam purposes. At the hoisting works we pumped a constant 3-inch stream—a stream three inches through—and let that water run to waste through the tunnel. We could use that water for our purpose if we needed it.

Thomas K Cummins, witness, was called for defendant, and by said witness defendant elicited evidence tending to prove: That he was in the Cinnabar Mining District before any mines were taken up there. That he knows the Altoona and Trinity claims, and the Altoona Ditch and the Boston Ditch. That he last saw them in the fall of 1891, and first saw them when they were originally dug. That he was in the mines every season from the time he first went there until after 1881. That from 1886 to 1891 he had a camp there. That he was there every season during those years. That since 1886 he has known the Boston Ditch between the Boston Mine and the Altoona Mine, and that he saw it at the time it was first dug, but does not recollect what year that was. That from the year 1886 to the year 1891 there was no water ran in the Boston Ditch from the Boston Mine to the Altoona Mine or reservoir. That years before that he saw water run through that portion of the ditch and into the reservoir. That he can recollect only on one occasion. That from 1886 to 1891 there was a good deal of loose float rock and sediment in the Boston Ditch from the Boston Mine down to the reservoir. Every winter when the snow goes off it will in places slide the debris down.

As it is melting, the snow itself becomes heavy, and the rains will wash it down. There is a good deal of loose float rock—fine rock—and also sediment along that side between the Boston Mine and where the ditch drops down to the reservoir. You can take any ditch in the world, and if it is not attended to every winter, it will have to be cleaned out in the spring in a snow country. That that portion of the ditch would not carry water without being cleaned out. I never went there for the purpose of looking to see whether the ditch would carry water, or anything that way. I was examining the ground there to see where I would set stakes, and surveying around to see what ground I would take up. It was with a view of locating a mining claim. That is what I was doing there. I noticed three places where the ditch would not carry water; one near the Boston Mine, where the lower bank of the ditch had been cut away, and the debris from the snow and rains had filled it up. I could not state how near it had filled the ditch, I did not measure it. I could see the outside of the bank of the ditch, and a little on the inside of the lower bank. The upper part of the upper bank would show there. The ditch was not cut away. It was filled up with a little slide. I never saw the ditch even full of water from 1886 to 1891. The stuff that it filled into the ditch in that place, had washed or slid down from the upper bank. That fill was from 10 to 20 inches long. The next place where the ditch was in bad condition was above the Doliff Claim. There there is a shallow ravine, and on each side of it a slide had come into the ditch from above. Each of these slides was

more than a foot long. I could see the lower bank of the ditch at that place. I don't know whether I could see the inside of the lower bank of the ditch or not, but I could see the inside of the upper bank of the ditch. The third place was between the Doliff and the Carr Claim. It was similar to the one I have just described. It was filled up so that you would have to clean it out before you could run water. I can't tell how much of the inside of the bank of the ditch I could see at that place. In 1886, I went to the Cinnabar District in April, and left in November. Part of the time my camp was about two miles from the Boston Mine, and the rest of the time about three miles and a half, and I was in and out from my camp during that season. In 1887 and 1888 I had a cabin below the Boston Mine. In those years I saw Mr. Butler at the Boston Mine mining.

Mat Young, witness, was introduced by defendant, by whom defendant elicited testimony tending to prove: That he had been in the Cinnabar Mining District since 1891, in the spring. That he knew the Boston Ditch. That in 1891 he didn't pay any attention to it, but it was in no condition to run water through. He has noticed it since 1891. That it is filled up more than it was in 1891. That every spring the bank caves in, and it keeps filling up more. That it was filled up in places—slides off from the banks all along. That in some places it was full—pretty near full, and in other places it was not so full. That it was filled more or less all along the ditch. That since 1891 below the Boston Mine down to

the reservoir it was filled up more than it was then. That in 1892 the Boston Ditch from the Boston Mine to Wiltz Gulch was pretty well filled with rocks, and in some places boulders were in it, and logs and limbs. That it was in no condition to run water through it before it was cleaned out. There was a deep cut on the ditch for a hundred or a hundred and fifty feet where the dirt had run down in the ditch and filled it up a foot over the ditch. That was the worst place on the ditch. That the witness and a man named Walker cleaned it out in 1892. That they used a pick and shovel in cleaning the ditch. That it was baked so hard at the bottom of the ditch that you had to pick it up before you could shovel it. That in September of the present year he crosses the Altoona Ditch and the water was running through it, filling the Altoona Ditch about two-thirds full. On cross-examination, the witness testified that he went expressly to look at the ditch just before he came down here to be a witness on the 6th of this month. That the other times when he visited the ditch he was going hunting. That he had worked for the Integral Mining Company off and on since 1891. That he helped clean the Boston Ditch from the Integral Mine to the Wiltz Gulch, and from the Wiltz Gulch to Crow Creek. That only two of us worked on the ditch, and it took them only about three weeks to clean it out. That they found nothing in the ditch but what they could take out with a pick and shovel. That the cut he spoke about, where the ditch was filled up at the most to the depth of a foot, was where the ditch ran around a point, and the cut was

eight or ten feet deep. The material was material that had dropped off of the sides of the bank until it got about a foot deep. The banks of the ditch there were almost perpendicular, and were composed of dirt and loose rocks in the dirt. In July or August, 1891, he walked along the Boston Ditch from Crow Creek to where the ditch drops off into Wiltz Gulch. There is about two miles of the Boston Ditch between the Integral Mine and its head on Crow Creek, leaving out the portion where the water runs in natural channels. When Walker and I worked we only worked week days. Walker and I did all the work that was done on that ditch that year. The water was turned into that ditch in 1892, about the first of August. I helped to do it. I had nothing more to do with that ditch that year. I have cleaned it out several times since. I worked on it some in the spring of 1895. Where we had to use the pick in cleaning out the ditch was where the water running in the ditch had settled it there. It will do that in any ditch.

J. R. Hudson, called in rebuttal for the plaintiff, testified: I am a photographer and artist. I have been engaged in the business about 27 years, and have practiced my vocation in Illinois and California. Witness is shown defendant's photograph Exhibits B, C, D, E, F, and G, and testified that he heard Mr. Carter's testimony concerning Exhibit B, that the negative from which that was printed was shown him right on the ground where the photograph was taken, immediately after the negative was taken. That if it had been so

shown to Mr. Carter nothing would have been visible on it. That a negative has, after being taken, to be put in an artificial light or chemical light and solutions of chemicals that have been devised for the development of the picture, before it can be seen at all—before anything in the nature of a picture can be seen. That if the negative had been shown to Mr. Carter there on the ground, no photograph could ever have been printed on it, because the action of the light would have obliterated it. The light would destroy the negative. To have exposed it to light before it had been in the dark room would entirely destroy the picture, so that no photograph could be produced from it. Witness having examined defendant's Exhibits E, F, and G, testified that the photographs are on gelatine surface paper, and have been taken so long that the pictures have become dimmed, and the picture flattened out. That the strength of the picture is gone. That the whole field is whitened, and the shadows have been so affected by overtime, that it makes the entire surface represented in the picture look flat. That the pictures were taken with the light in such a direction as not to show the shadows, even of the trees. That in pictures taken in that way it is almost impossible to show depressions. The effect would be, that the picture does not show the actual depressions in the surface of the earth. It has a tendency to make it look as though there were little or no depressions there. Taken in the way the pictures were, it would be impossible to give the depressions in the subject. That the only way to show the depressions correctly is by showing a shadow

in the picture. Witness then examines the portions of the picture marked by the witness Carter, and says that from his study of the photograph, and from his knowledge of photography, that the ditch at the various places marked and represented is from 16 inches to 3 feet deep. That he cannot tell the exact depths of the ditch from the photographs, but that he can come very near it.

The case being closed, the Court instructed the jury as follows, to wit:

The Court. Gentlemen of the jury, I am about to submit to you the propositions of law which you are to consider in this case in connection with the facts.

The complainant in this case states two causes of action; one in ejectment for the recovery of the Boston Ditch—I designate it by name as you have already become familiar with it—one in ejectment for the recovery of the Boston Ditch and water rights; and one essentially for damages for the diversion of waters from the Altoona Ditch. The plaintiff has waived a recovery for damages, which makes it unnecessary to pass on the latter cause of action—that is, the cause of action for the diversion of waters from the Altoona Ditch. I therefore withdraw it from your consideration. So that there will be no misunderstanding, I repeat: I withdraw from your consideration the cause of action regarding the Altoona Ditch. This, gentlemen of the jury, is the Court's action to a certain extent, and is more or less technical, and you should not let it affect your consideration of the other cause of action, or standing of either

of the parties in the case in any way at all. Your inquiry then will be confined to the rights of the parties respectively in and to the Boston Ditch, and the water rights connected with it.

Before stating the specific propertions of fact involved in this inquiry, I will state that the right to the use of water in a running stream may be acquired either by posting notices, under the Code of this State, and otherwise complying with it, or by an actual appropriation and use without posting the notices, and as between appropriators, the one first in time is the first in right. The original appropriation by the Boston Ditch, was by the latter method—that is, by possession and use. The defendant claims by the former—that is, by posting notices and complying with the Code.

It is conceded that the Boston Cinnabar Mining Company constructed the Boston Ditch, or rather it is conceded that the ditch was first commenced to be constructed by Mr. Butler, and afterwards completed by the Cinnabar Mining Company, and it is claimed by the plaintiff in this case that it thereafter, that is, the Boston Cinnabar Mining Company—conveyed the ditch and water rights to it, the plaintiff, and plaintiff also contends that it diverted water through the ditch and applied the same to useful purposes and let it to others to be applied to such purposes.

This brings us to the three propositions of fact involved in the inquiry of the respective rights of the parties in and to the ditch. They are as follows :

First. Is the plaintiff the grantee of the original owners of the Boston Ditch ?

Second. If not, did it acquire the right to the ditch and water by possession and use?

Third. Or if either, did it abandon such ditch and use.

On the first proposition there is a deed introduced in evidence from the Cinnabar Mining Company to the defendant, dated 16th of August, 1877. This deed conveyed the right and title in the ditch and water to the plaintiff if at its date the Boston Mine had not been abandoned. It is necessary, therefore, for you to find the date of the abandonment of the mine, and if you find that the mine was abandoned before the deed was executed, the deed passed no right or title to the water, and you must find on that issue for the defendant; that is, you must find that the plaintiff is not the grantee of the Cinnabar Mining Company. If, however, you should so find, you will consider the next proposition: did plaintiff acquire a right by possession and use before defendant's appropriation or attempted appropriation. If you find it did not you will find on this issue for defendant—indeed, you will find a verdict for defendant, for that will determine the case, for, if the plaintiff was neither the grantee of the Cinnabar Company, nor acquired rights after abandonment by such company, it cannot recover. If you, however, find on that proposition for the plaintiff, you will consider the next proposition: did it after acquiring such rights lose them by abandonment?

The law provides that an appropriation must be for some useful or beneficial purpose, and when the appro-

priator or his successor in interest ceases to use it for such a purpose, the right ceases. This does not mean that the appropriator is confined to the first use or to the first place of use. He may change both if others are not injured by the change. The ditch may be extended to places beyond that where the first use was made. The right then which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such an abandonment there must be a concurrence of act and intent, viz: the act of leaving the premises or property vacant so that it may be appropriated by the next comer, and intending not to return.

The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone without an intention to abandon be held to amount to an abandonment. Abandonment, therefore, is a question of fact. Yielding up possession and non-user are evidence of abandonment, and under many circumstances sufficient to warrant the deduction of the ultimate fact of abandonment. But it may be rebutted by evidence which shows that notwithstanding such nonuser or want of possession the owner did not intend to abandon it.

Use of the ditch and water by any other person by permission of the owner is sufficient to maintain the owner's possession, or right of possession, as though it were used by the owner.

Gentlemen of the jury, those are the propositions of law for you to apply to the facts. I think I can trust

you to apply them without any attempted application myself, considering the elaborateness with which the evidence was introduced, and the ability with which the case was argued.

If you find that the plaintiff was the grantee of the Cinnabar Mining Company, or acquired a right to the water in the manner I have indicated to you, by possession and use, and has not abandoned the same, you will find for the plaintiff. If you find that it was not the grantee of the Cinnabar Mining Company, or did not acquire an appropriation of the ditch as I have instructed you, or that it has abandoned its rights, if it had any, you will find for the defendant.

Your verdict, gentlemen, will be comparatively simple. In this Court it requires a concurrence of all of you to find a verdict. I mention this because in the State Court three-fourths of a jury can find a verdict. It must be unanimous in this Court.

You will retire to your jury-room and select one of your number as foreman, and when you have agreed on a verdict you will return into Court.

I have prepared forms of verdict for you, gentlemen of the jury. If you find for the plaintiff, your verdict will be: "We, the jury, find in favor of the plaintiff." Damages you have no concern with. While there is an allegation of damages in the complaint on the first cause of action, the damages are waived; hence, you should not find on damages. If you find for the defendant, the form of your verdict will be: "We, the jury, find in favor of the defendant." Whichever one of these forms you agree on, you will so declare by your verdict.

Mr. Cross. Your Honor has used the word "or" there in one place where you meant to use the word "and" in the last charge, where you said if they find that the Boston Mine was abandoned before the deed was made, "or" that the plaintiff did not appropriate the water—that word should have been "and."

The Court. I will repeat it. I will repeat the oral part. If you find from the evidence that the plaintiff in the case was the grantee of the Cinnabar Mining Company, and you also find from the evidence that it did acquire rights to the water after the abandonment of the out of the Boston Ditch so that it would go down to the Boston Mine by the Cinnabar Company, and also find that it has not abandoned such rights, if it had any, you will find for the plaintiff. If, on the other hand, you find that the plaintiff did not acquire any rights from the Cinnabar Company—in other words, was not its grantee, or did not acquire any rights independent by the use and possession after the abandonment of the Boston Mine, or, if you find it was such grantee, or did acquire such rights, but abandoned them—you will find for the defendant. Is that clear?

Whereupon, counsel for defendant, in the presence of the jury, excepted to that portion of the foregoing charge which reads as follows, viz:

"To abandon such right is to relinquish possession "thereof without any present intention to repossess. To "constitute such an abandonment, there must be a con- "currence of act and intent, viz, the act of leaving the

"premises or property vacant so that it may be appro-
"priated by the next comer, and intending not to re-
"turn."

Defendant also excepted to that portion of the instructions reading as follows:

"The mere intention to abandon, if not coupled with
"yielding up possession or cessation of user is not suf-
"ficient; nor will the nonuser alone, without an inten-
"tion to abandon, be held to amount to an abandon-
"ment. Abandonment is therefore a question of fact.
"Yielding up possession and nonuser are evidences of
"abandonment, and under many circumstances sufficient
"to warrant the deduction of the ultimate fact of aban-
"donment. But it may be rebutted by evidence which
"shows that notwithstanding such nonuser or want
"of possession the owner did not intend to abandon it."

Defendant also excepted to that portion of the charge reading as follows:

"Use of the ditch and water by any other person by
"permission of the owner is sufficient to maintain the
"owner's possession, or right of possession, as though it
"were used by the owner."

Counsel for defendant also excepted to the charge of the Court on the ground that the Court in his charge to the jury omitted one of the elements of abandonment, in this:

"That one of the elements of abandonment is left
"entirely out—that is, no matter how strong the inten-
"tion is to use the water, or take the use of the water,
"or continue to use it at another time, still, if at another

" time they do not use it or begin to use it, or commence " work looking to the use of it in the near future, that, " then, is abandonment, no matter how strong their " intention in the future is. They must do some active " work applying the water to that use or some other " beneficial use."

Prior to the submission of the case to the jury, defendant, in due form and in writing, asked an instruction to the jury as follows:

" The use required by the statute to entitle a person " to the waters of a stream must be an actual use for " some beneficial purpose. It is not sufficient under the " law that there be simply a claim to the water without " any use. And if you find from the evidence that the " plaintiff, the Altoona Quicksilver Mining Company, " did not, since the year 1881, use any of the waters " that ran through the Boston Ditch, and did not in " good faith intend to use them, but allowed the ditch " to go to ruin and decay, so that the same could not be " used as a ditch, but claimed the Boston Ditch and " water right for the sole purpose of preventing others " from using said water for a beneficial purpose, I charge " you that such a claim is not sufficient to entitle plain- " tiff to the possession of said ditch in this action, " and you should find for the defendant upon that branch " of the case."

Which instruction the Court refused to give. To which refusal of the Court the defendant in due form, and prior to the submission of the case to the jury, in the presence of the jury, duly excepted.

Prior to the submission of the case to the jury, the defendant, in due form and in writing, requested the Court to instruct the jury as follows:

"No appropriation of water can be made for purely "speculative purposes, and the right to use water can "only be acquired for the purpose of applying it to a "beneficial purpose, and as soon as the purpose ceases, "the right to use the water ceases at once, unless the "appropriator, within a reasonable time, takes active "steps to apply said water to another beneficial use.

"A person cannot hold the right to use water against "the subsequent appropriator by an intent formed in the "mind to, at a future date, put the water which he has "ceased to use to another and different purpose or use, "unless he begins active work upon the new use within "a reasonable time after he has ceased to use the water "for the original purpose, and prosecuted the same dili-"gently to a conclusion. The law does not permit a per-"son to hold water for speculative purposes, and no mat-"ter how good the intentions of the appropriator may "be to use water for a beneficial purpose in the future, "still, he is only allowed a reasonable length of time, "consistent with the magnitude of the work necessary "to use the water, and his diligent and reasonable exer-"tions to complete the work."

The Court refused to give such an instruction; to which refusal of the Court, defendant by its counsel, then and there, and in the presence of the jury, before the case was submitted to them, duly excepted.

Counsel for defendant also, before said case was sub-

mitted to the jury, duly and in writing requested the Court to instruct the jury, as follows, to wit:

"By act of Congress, the government of the United "States has given to the appropriators and users of "waters the right to run their canals and ditches over "the vacant and public lands of the United States. The "right to run canals and ditches does not give the party "building the same any title to the land, except the "right of way across it. The right is merely an ease-"ment, and continues only so long as the ditch is used "to convey water for a needful and beneficial purpose, "and whenever the party who built the ditch, or his "successors in interest ceases to use the same for an un-"reasonable length of time for the purpose of conveying "water to be used for a needful purpose, then the rights "of the party who built the ditch, or his successors in "interest, ends, and any person may enter into and upon "said ditch and use the same to convey water for the "purpose of applying it for a beneficial use, and the "party who built the ditch, or his successors in interest, "cannot complain."

The Court refused to give such an instruction, and defendant, by its counsel, prior to the submission of said case and in the presence of the jury, duly excepted to such refusal.

The defendant by its counsel, prior to the submission of said case to the jury, in due form and in writing, requested the Court to instruct the jury as follows, to wit:

"The test of the right to water in this State is gov-"erned by appropriation, use and nonuse. The right of

"a party to use water for a beneficial purpose continues "as long as the water is actually applied to that use, or "to some other beneficial use, and terminates when the "use is discontinued. The original use, however, can- "not be changed by the original appropriator or his suc- "cessor in interest to the detriment of a subsequent "appropriator, nor can the original appropriator or his "successors in interest assert, against a subsequent ap- "propriator, his intent to change the use of the water to "another purpose which will be injurious to a subsequent "appropriator, unless the first appropriator has done "some act and used due diligence within a reasonable "time towards the making of said change prior to the "appropriation of said water by another person. If the "purpose for which the water was originally appropriated "has failed, the first appropriator cannot hold that water "indefinitely for any other purpose, unless he takes "active steps to do so within a reasonable time and be- "fore others have appropriated the water. The doctrine "is that no man shall act upon the principle of the dog "in the manager either in the appropriation of water, "for which he has no present use, or in the holding of "water which he has ceased to use."

The Court refused to give such an instruction. To which refusal, defendant, by its counsel, before the submission of the case to the jury, and in the presence of the jury, duly excepted.

The foregoing Bill of Exceptions was presented in due season, is correct, and is settled and allowed by me this Dec. 26th, 1895. JOSEPH McKENNA,

Circuit Judge.

[Endorsed]: Filed Dec. 26th, 1895, W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY,
Defendant.

Petition for Writ of Error.

To the Honorable the Circuit Court of the United States, for the Ninth Circuit, Northern District of California:

Your petitioner, the Integral Quicksilver Mining Company, defendant aforesaid, represents that defendant's Bill of Exceptions in above case has been settled, allowed, and filed; that his assignments of error have been this day filed. Wherefore, petitioner respectfully requests that an order be entered allowing a writ of error from the Circuit Court of Appeals to this Court in above case.

S. F., Dec. 30th, 1895.

E. W. McGRAW,
Atty. for Deft.

[Endorsed]: Filed Dec. 30, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1895, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court-room in the City and County of San Francisco, on Monday, the 30th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable James H. Beatty, District Judge, District of Idaho, assigned to hold and holding Circuit Court for the Northern District of California.

ALTOONA QUICKSILVER MINING CO.,
vs.
INTEGRAL QUICKSILVER MINING CO., } No. 11872.

Order Allowing Appeal.

Upon motion of E. W. McGraw, Esq., attorney for plaintiff, and on filing a Petition for a Writ of Error and an Assignment of Errors, it is ordered that a Writ of Error be and hereby is allowed to the United States Circuit Court of Appeals for the Ninth Circuit herein.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY,
Defendant.

Assignment of Errors.

I.

The plaintiff offered in evidence the Notice of Location of the Trinity Mining Claim by John A. Lytle, A. W. Hawkett, and James McK. Crow, dated August 8th, 1872, and recorded in the office of the Recorder of Trinity County, California, August 15th, 1872, to the introduction of which notice in evidence defendant objected on the ground that the same was irrelevant, incompetent, and immaterial. Objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

II.

Plaintiff offered in evidence a deed dated August 1st, 1873, from James McKinley Crow to John Gray, of Crow's interest in the Trinity Mine, acknowledged the same date, recorded in the County Recorder's office of

Trinity County, August 4th, 1873. Also a deed from John Gray to David McKay of the same interest, dated August 2, 1873, acknowledged the same date, and recorded in the County Recorder's office of Trinity County, August 4, 1873. Also a deed of the same property from David McKay to Fred H. Loring and Augustus Rumfeldt, dated September 23, 1874, acknowledged the same date, and recorded in the County Recorder's office in Trinity County, September 28, 1874. Also a deed of the same interest from Rumfeldt and Loring to A. W. Hawkett and J. A. Lytle, dated October 5, 1874, and acknowledged the same date, and recorded in the County Records of Trinity County, October 19, 1874. To each of which conveyances defendant objected, on the ground that the same were irrelevant, immaterial, and incompetent; which objections were overruled by the Court; to which rulings of the Court defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

III.

Plaintiff offered in evidence Notice of Location of the Altoona Mine by John A. Lytle, dated September 26th, 1874, and recorded in the office of the Recorder of Trinity County, October 15th, 1874; which was objected to by defendant as immaterial, irrelevant, and incompetent. Objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, duly excepted; and the said ruling of the Court is hereby assigned as error.

IV.

Plaintiff offered in evidence a series of mesne conveyances: a deed from John A. Lytle to Philip W. McCarthy of the undivided one-tenth of the Trinity Quicksilver Mine, dated October 17, 1874, acknowledged the same date, and recorded in the County Recorder's Office at Trinity County, October 23, 1874. A deed from Lytle and McCarthy to Marks Zellerbach, dated July 1, 1875, of the undivided one-half of the Trinity Claim as located by Hawkett, Crow and Lytle, acknowledged July 7, 1875, and recorded July 19, 1875, in the Recorder's Office of Trinity County. Also a deed from A. W. Hawkett to Marks Zellerbach, dated August 13, 1875, acknowledged the same date, and recorded in the County Records of Trinity County, August 16, 1875, which deed purports to convey one-half of the Altoona Mine, one-half of the Trinity Mine, and one-half of the Crow Creek Ditch. Also deed from Lytle, Hawkett and McCarthy to Zellerbach, dated September 8, 1875, acknowledged the same date, and recorded September 24, 1875, purporting to convey the Altoona Claim, the Trinity Claim, and the Crow Creek Ditch and water rights; to each of which said conveyances defendant, by its counsel, objected on the ground that it was immaterial, irrelevant, and incompetent. The objections were overruled by the Court; to which rulings of the Court defendant, by its counsel duly excepted; and the said ruling of the Court is hereby assigned as error.

V.

Plaintiff offered in evidence the deed dated August

16th, 1877; by which the Boston Cinnabar Mining Company conveys to the Altoona Quicksilver Mining Company, in consideration of five hundred dollars, that certain ditch situatud in Trinity County, State of California, commencing at the Crow Creek and running thence to the Wiltz Ravine and thence to the mining property of the party of the first part, to wit, the Boston Cinnabar Mining Co., the same being one and a half miles long, more or less, and known as the Boston Cinnabar Mining Company's Ditch, which deed was duly acknowledged August 16, 1877, and recorded in the County Records of Trinity County, August 20, 1877.

The deed was objected to by defendant on the ground that it was void, as it appeared that it was made after the grantor had ceased to use the water. The objection was overruled, and deed admitted in evidence, to which ruling of the Court defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

VI.

Plaintiff identified by witness M. D. Butler a letter received by him shortly after it was written, which letter reads as follows:

"Jan. 10th, 1889.

"Mr. M. D. Butler, Cinnabar,

"*Dear Sir:* The Altoona Quicksilver Mining Com-
" pany hereby grants you permission to use the water
" out of the ditches belonging to the above-mentioned
" company this spring, and until such a time as the
" company shall have use for the same, due notice of

" which you will receive from the undersigned. In " consideration therefor you agree to keep the ditches " in good order and repair, without any charge to this " company. Please give me in writing your concurrence " thereto.

" Yours truly,

" CHARLES ALLENBERG,

" Secretary Altoona Quicksilver Mining Company."

To which counsel for defendant objected, on the ground that the same was immaterial, irrelevant, and incompetent. Objection was overruled by the Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

VII.

Plaintiff identified by witness Butler a certain letter written and mailed by him at the date thereof, and received by Charles Allenberg shortly after, and offered it in evidence, which letter reads as follows:

" CINNABAR MINING DIST.,
" TRINITY CO., Jany. 29, '89.

" CHAS. ALLENBERG, Esq.:

" *Dear Sir:* I am in receipt of yours of 22nd inst· " inclosing permit to use water out of ditches belonging " to Altoona Quicksilver Mining Company, and in con- " sideration I agree to keep said ditches in good order " and repair at my own expense, and keep possession of " same for said company subject to your order.

" Yours truly,

" M. D. BUTLER."

Counsel for defendant objected, on the ground that it was immaterial, irrelevant, and incompetent. Objection overruled, to which ruling of the Court defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

VIII.

Witness M. D. Butler testified as follows: That in 1890 and 1891 he was operating for the Altoona Quicksilver Mining Company and was their general manager and superintendent up there. That the work done on the Loring Claim was done with water from the Altoona Ditch. I was not there at the time. I only saw what had been done. That about three-fourths of an acre has been sluiced off the Trinity and Altoona claims. That up to the time witness left, the ledge had been worked to the depth of 120 feet, and there was 800 or 900 feet of tunnel in hard rock.

Plaintiff then asked the following question: "Do you know how much ore had been taken out of that mine up to the time that you left?"

Objected to by defendant as immaterial, irrelevant, and incompetent; objection overruled, to which ruling of the Court defendant, by its counsel, duly excepted; and the said ruling of the Court is hereby assigned as error.

The witness answered as follows. About 12,000 flasks of quicksilver from the Altoona and Trinity claims. A flask of quicksilver is 76½ pounds.

IX.

Counsel for plaintiff then asked said witness, M. D. Butler: Do you know what the value of quicksilver has been during those times?

Objected to by defendant as immaterial, irrelevant, and incompetent; objection overruled by the Court, to which ruling defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

Witness answered: At one time $115.00 a flask, and from that down to $45.00.

X.

Said witness, M. D. Butler, testified that he had often been in the Altoona mine and tunnel.

Plaintiff asked of said witness the following question: State whether or not the ore body appears on the bottom of the tunnel?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled, to which ruling of the Court defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

The witness answered: It does for nearly 600 feet.

XI.

Plaintiff then asked said witness, M. D. Butler: How wide is that ore body?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled, to which ruling

of the Court defendant duly excepted, and the said ruling of the Court is hereby assigned as error.

The witness answered: It varies from 4 feet to 22½; that was apparent in the bottom of the tunnel, right through there, and all of the work has been done above the level of the tunnel.

XII.

The said witness, M. D. Butler, testified that he sluiced on the Boston Mine in 1886 and 1887 with water from the Boston Ditch. That he relocated the Boston Mine September 10th, 1885, and it was after that that he used the water.

Plaintiff then asked the following question: Did you have any controversy with the superintendent of the Altoona Company about your right to use that water?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled; to which ruling of the Court defendant, by its counsel, duly excepted, which said ruling of the Court is hereby assigned as error.

The witness answered: I did, with Louis Girard, who was the representative of the Altoona Quicksilver Mining Co., on the ground, about the use of the ditch and water.

XIII.

Plaintiff then asked said witness, M. D. Butler: What did he say to you about it?

To which question defendant objected as immaterial, irrelevant, and incompetent. Objection was overruled; to which ruling of the Court defendant, by its counsel,

duly excepted, and the said ruling of the Court is hereby assigned as error.

The witness answered: He came on the ditch and told me I must stop using the water of the ditch ; that it was the property of the Altoona Company.

XIV.

Said witness, M. D. Butler, further testified: That the defendant took possession of the Boston Mine some time in 1891 or 1892. That the witness turned the water out of the Boston Ditch so that it would go down to the head of the Altoona Ditch, for the purpose of keeping the water running continuously at the Altoona Mine, on August 9, 1892, and posted a notice that the Altoona Company claimed the ditch and water right, and forbidding any person trespassing upon those properties, and also about the 17th of August. I needed all of the water at those times for use on the Altoona Mine. That two days after the witness turned the water out of the Boston Ditch the McCaws turned it back into the Boston Ditch again. That they continued to use it afterwards that season at the Boston Mine.

Question by Plaintiff. What happened after that between you and any officer of the Integral Company, and what conversations occurred between you and any officer of the Integral Company, with regard to the use of this water, if any ?

Answer. I met Professor McCaw on the trail one day. He was going out to the railroad and I was coming in. He protested against my interfering with the

water, and warned me that if I continued that interference, his gang would string me up.

Counsel for defendant moved to strike the answer of the witness out, because it had nothing to do with the case.

The motion was denied by the Court, to which ruling of the Court defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

XV.

Plaintiff's witness, F. H. Loring, testified: That in 1881, 1882, and 1883 he used the water by arrangement with the Altoona Company; also in 1884. In this connection plaintiff offered in evidence a certain agreement, identified by witness, having first proved the genuineness of the signature of F. H. Loring and E. L. Goldstein, and also having proved that at that time said Goldstein was president of the Altoona Quicksilver Mining Company.

Counsel for defendant objected to the introduction of said agreement in evidence on the ground that the same was irrelevant, immaterial, and incompetent. Objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

Said agreement reads as follows, to wit:

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part,

"Witnesseth: That the said party of the second part "agrees that the party of the first part may have what- "ever water belonging to said party of the second part "is requisite for the working of the quicksilver mine "of said first party, and may use the iron pipe of said "second party for the purpose of conducting said water "to the mine of said first party, and in consideration "thereof the said party of the first part agrees to give "and pay to the said party of the second part one-third "of the net proceeds of the mine of said party of the "first part so worked by him. The party of the second "part is to incur no liability or expense whatever in case "there shall be no proceeds from working said mine, and "the party of the first part is not to pay to the party of "the second part any compensation whatever for the use "of said water and pipe unless and until after all the "expenses of working said mine shall have been paid "out of the proceeds thereof. This agreement is not to "continue after the expiration of the year 1882.

"In witness whereof, the party of the first part and "of the second part have executed this instrument the "31st day of May, 1882.

"E. L. Goldstein,
"President Altoona Q. Mg. Co.
"F. H. Loring,
"Davis Cinnabar Mine."

XVI.

Plaintiff also had identified and proved the genuineness of the signature, and that at the date of the instrument said E. L. Goldstein was president of the Altoona

Quicksilver Mining Company, and offered in evidence a certain agreement; and defendant, by its counsel, objected to the introduction in evidence of said agreement, on the ground that the same was irrelevant, immaterial, and incompetent. The objection was overruled by the Court; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

The said agreement reads as follows:

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part,

"Witnesseth: That the said party of the second part "agrees that the party of the first part may have what- "ever water belonging to said party of the second "part is requisite for the working of the quicksilver "mine of said first party, and may use the iron pipe of "said second party for the purpose of conducting said "water to the mine of said first party, and in considera- "tion thereof the said party of the first part agrees to "give and pay to the said party of the second part "one-third of the net proceeds of the mine of said party "of the first part so worked by him.

"The party of the second part is to incur no liability "or expense whatever in case there shall be no proceeds "from working said mine, and the party of the first part "is not to pay to the party of the second part any com- "pensation whatever for the use of said water and pipe, "unless and until after all the expenses of working said

" mine shall have been paid out of the proceeds thereof.

" This agreement is not to continue after the expiration " of the year 1883.

" In witness whereof, the party of the first and of the " second part have executed this instrument this sixth " day of March, 1883.

" E. L. GOLDSTEIN,
" President Altoona Quicksilver Mg. Co.
" F. H. LORING,
" Davis Quicksilver Mine."

XVII.

Witness J. F. Cox, on cross-examination, testified That while he was superintendent he put some boxes in the Altoona Ditch and covered them over, six inches square. That there was a string of 20 or 30 boxes. That they were put in for the purpose of giving water during the winter months. The boxes were there yet. That they probably extended three hundred feet. They extended from the Altoona Ditch to the furnace into two different tanks, 300 feet or a little more. That the water that was coming down the ditch for the last year was water that ran through those boxes. That after putting in the boxes he filled in the ditch on each side and covered the boxes over to prevent the water from freezing.

On redirect examination of said witness, plaintiff elicited evidence tending to prove: That the water carried through those boxes was the water used to supply the engines of plaintiff for steam purposes, and to the condensers for the purpose of condensation. That the boxes

were put in the immediate center of the ditch at the extreme lower end of the ditch, immediately at the mine.

Counsel for plaintiff thereupon asked the witness the following question:

"What other uses could be made of that water at the Altoona mines by the Altoona Company?"

Question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent. Objection overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: "It can be put to pumping, hoisting, producing electric power, and so forth.

XVIII.

Counsel for plaintiff then asked of said witness Cox the following question: State whether or not all those purposes are necessary and useful in the working of the mine?

To which question counsel for defendant objected on the ground that the same was incompetent and immaterial. Objection was overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To this question the witness answered: They are both necessary and useful.

XIX.

Plaintiff's witness, J. M. Gleaves, testified: That he had measured the capacity of the Boston and Altoona

ditches to carry water. That the capacity of the Boston Ditch is 618 inches, measured under a 4-inch pressure. The Altoona Ditch, run its full capacity, is about 1000 miner's inches.

Counsel for plaintiff asked the following question: State to the jury whether or not you made surveys for the purpose of ascertaining the elevation of the lower end of the ditch (the Boston Ditch) above the collar of the shaft in the hoisting works of the Altoona Mine?

This question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent. The objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: I took the elevation between the collar of the shaft and the mouth of the Altoona Ditch, and found about 43 feet difference in the elevation.

XX.

That between the collar of the shaft and the Boston Ditch, on the point of the little hill above the mine, the difference was a fraction less than 162 feet. That the collar of the shaft is the main level of the floor in the hoisting works. That the shaft is used for hoisting ores and for general working purposes of the mine, and for pumping.

All this testimony was given under the objection of defendant as being incompetent, irrelevant, and immaterial, and was admitted by the Court subject to the exception of the counsel for defendant to the ruling of the

Court, and the said ruling of the Court is hereby assigned as error.

XXI.

Also the following testimony was given under the same objection, ruling, and exception:

That there is a cage used for hoisting ore and for taking men up and down in the mine. That it is operated by steam power for that purpose. That it runs perpendicularly. Mining timbers have to go up and down that shaft. That the collar of the shaft is the upper end—the top. That that is where the cages come to the surface and discharge. That the cages are stopped at the collar of the shaft, and the cars loaded with ore are run off and taken out where they are placed in retorts and furnaces. That the shaft had been sunk when witness was there about 240 feet. That when witness was there they were drifting or working at the bottom. That when the level at 240 feet had been worked a good miner would go down and sink the shaft deeper.

And the said ruling of the Court is hereby assigned as error.

XXII.

Louis N. Girard, witness for plaintiff, testified: That in 1886 he had charge of the Altoona mining properties.

Counsel for plaintiff asked the witness the following question:

During the year 1886 did you make any arrangement for the company with the Butlers in regard to the use of the water of the Boston Ditch ?

This question was objected to by counsel for defendant

as irrelevant, immaterial, and incompetent, which objection was overruled by the Court; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

The witness answered to this question: I let Mr. Butler use the water for the repairing of the ditch, keeping it up in repair; he agreed to put the ditch in repair for the use of the water. I made that arrangement in the interest of the Altoona Quicksilver Mining Co., as its representative.

XXIII.

Plaintiff's witness, Charles Allenberg, testified: That he was the general manager of the affairs of the corporation plaintiff since 1887.

Plaintiff asked said witness the following question:

During that time what has been your intention as the general manager of the corporation, with regard to holding the corporation's rights to these ditches and water rights?

Which question was objected to by counsel for defendant, as immaterial, irrelevant, and incompetent.

The objection was overruled by the Court; to which ruling of the Court, counsel for defendant, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered. Always intended to hold our rights to those ditches.

XXIV.

Plaintiff then asked said witness the following question:

In the same connection, what has been the intention with regard to the Boston Ditch and the water right used with the Boston Ditch, since the date of the deed from the Boston Company to the Altoona Company in ?

To which question counsel for defendant objected, on the ground that the same was immaterial, irrelevant, and incompetent, which objection was overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To this question the witness answered: Always intended to hold our right to the ditch and the water right.

XXV.

Plaintiff then asked said witness the following question:

And what in the same connection with regard to the Altoona Ditch and the right to divert water through it?

Same objection, ruling and exception, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: The same.

XXVI.

Plaintiff then asked said witness:

What use could be made of the water through the Altoona and Boston ditches for the purposes of that

company other than what it has actually been appropriated to?

Objected to by counsel for defendant, on the ground that it was irrelevant, immaterial, and incompetent, and purely speculative.

Objection overruled by the Court, to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

Answer. We could use the water for water power, to run our machinery by water power.

XXVII.

Plaintiff then asked said witness the following question:

What advantages would you have as to power when you could bring the water through the Boston Ditch over what you would have in bringing the water through the Altoona Ditch?

Same objection, ruling, and exception, and the said ruling of the Court is hereby assigned as error.

Answer. The difference in the elevation; could get so much more power through the Boston Ditch than through the Altoona Ditch; the higher elevation gives more pressure.

XXIX.

Plaintiff then asked the witness the following question:

What benefits would accrue to the company from using this water for power over obtaining power by other means which could be used?

Same objection, ruling, and exception, and the said ruling of the Court is hereby assigned as error.

Answer. It would save us from using steam power, and consequently save a good deal of wood to make steam for the boilers. It would also save an engineer.

XXX.

Plaintiff then asked said witness the following question:

How much expense per month would it save the company during such months as it would furnish power?

Same objection, ruling, and exception, and the said ruling of the Court is hereby assigned as error.

Answer. It would save some $600 per month during such time as we had the water power.

The counsel for defendant moved to strike out the answer. Motion denied; to which ruling the counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

XXXI.

Plaintiff then asked said witness the following questions:

Question. Did you see Mr. M. D. Butler in this city during the years 1886 and 1887, from time to time?

Answer. Yes, sir; at my office on Brannan St.

Question. Did you have any conversation with him at those times with regard to the use of the Boston Ditch and the water there?

Question objected to by defendant as incompetent, irrelevant, and immaterial. Objection overruled; to

which ruling of the Court defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

Answer. Mr. Butler came to me on several occasions and asked me for the use of the water for sluicing boxes and some for iron pipes; and I always gave him permission to use our water for sluicing boxes or iron pipes. He wanted to use the water on the Boston mines, and naturally wanted to use the water of the Boston Ditch. That was the only ditch that would carry the water on that mine so far as I know.

XXXII.

Counsel for plaintiff then offered in evidence the patent of the United States to the Altoona Quicksilver Mining Co., for the Altoona Quicksilver Mining Claims dated June 21st, 1895. Which patent was objected to by defendant as immaterial, irrelevant, and incompetent, and as having been issued subsequent to the commencement of this action. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

XXXIII.

Said witness Allenberg further testified:

That the Altoona and Trinity quicksilver mines had not been worked out in 1885. That the steam hoisting and pumping works and the reduction works which are now on that property were built in 1894. That they were commenced about June, 1894, and completed about December, 1894.

Plaintiff then asked the witness the following question:

What amount of quicksilver has the mine produced since that time—since you commenced putting up those works, which you say you commenced putting up about a year ago?

Objected to as immaterial, irrelevant, and incompetent, and referring to matters occurring since the commencement of this cause. Objection overruled to which ruling of the Court the defendant by its counsel then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

Witness answered: About $71,000 worth.

XXXIV.

Counsel for plaintiff then asked witness the following question:

To what depth has the mine been worked?

Objected to as immaterial, irrelevant, and incompetent. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Two hundred and thirty-one and a half feet.

XXXV.

Plaintiff then asked the said witness, Allenberg, the following question:

What is and has been the intention of the company and of yourself as general manager of the company,

with regard to the working and development of that mine since the year 1880?

Objected to as irrelevant, immaterial, and incompetent. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Since 1880 we contemplated to work the mine, as we are doing now, but we were unable to do so until last year on account of litigation between the stockholders of the Altoona Quicksilver Mining Co.

Mr. Campbell, Counsel for Defendant. I move to strike that answer out. Motion denied by the Court; to which ruling counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

XXXVI.

Counsel for plaintiff then asked said witness the following question:

What amount of money was expended by the Altoona Quicksilver Mining Co. in the operation and development of its properties in the Cinnabar Mining District in Trinity county, California, from the time the Company took possession of the property up to the commencement of this suit?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection was overruled by the Court; to which ruling counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question witness answered: About $257,000.

XXXVII.

The Court erred in charging the jury as follows:

"To abandon such right is to relinquish possession "thereof without any present intention to repossess. To "constitute such an abandonment there must be a con- "currence of act and intent, viz: The act of leaving the "premises or property vacant so that it may be ap- "propriated by the next comer, and intending not to "return."

XXXVIII.

The Court erred in charging the jury as follows:

"The mere intention to abandon if not coupled with "yielding up possession or cessation of user is not suf- "ficient; nor will the nonuser alone without an intention "to abandon be held to amount to an abandonment. "Abandonment is therefore a question of fact. Yield- "ing up possession and nonuser are evidences of abandon- "ment, and under many circumstances sufficient to war- "rant the deduction of the ultimate fact of abandonment. "But it may be rebutted by evidence which shows that "notwithstanding such nonuser or want of possession the "owner did not intend to abandon it."

XXXIX.

The Court erred in charging the jury as follows:

"Use of the ditch and water by any other person by "permission of the owner is sufficient to maintain the "owner's possession, or right of possession, as though it "were used by the owner."

XL.

Counsel for defendant also excepted to the charge of the Court, on the ground that the Court in his charge to the jury omitted one of the elements of abandonment in this:

"That one of the elements of abandonment is left "entirely out—that is, no matter how strong the inten- "tion is to use the water, or take the use of the water, "or continue to use it at another time, still, if at an- "other time they do not use it, or begin to use it, or "commence work looking to the use of it in the near "future, that, then, is abandonment, no matter how "strong their intention in the future is. They must do "some active work applying the water to that use, or "some other beneficial use."

And said omission from said charge of the Court is hereby assigned as error.

XLI.

The Court erred in refusing to charge the jury at the request of the defendant as follows, to wit:

"The use required by the statute to entitle a "person to the waters of a stream must be an actual "use for some beneficial purpose. It is not "sufficient, under the law, that there be sim- "ply a claim to the water without any use. And "if you find from the evidence, that the plaintiff, the "Altoona Quicksilver Mining Company did not, since "the year 1881, use any of the waters that ran through "the Boston Ditch, and did not in good faith intend to

" use them, but allowed the ditch to go to ruin and " decay, so that the same could not be used as a ditch, " but claimed the Boston Ditch and water right for the " sole purpose of preventing others from using said water " for a beneficial purpose, I charge you that such a " claim is not sufficient to entitle the plaintiff to the " possession of said ditch in this action, and you should " find for the defendant upon that branch of the case."

XLII.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to wit:

" No appropriation of water can be made for purely " speculative purposes, and the right to use water can " only be acquired for the purpose of applying it to a " beneficial purpose, and as soon as the purpose ceases, " the right to use the water ceases at once, unless the " appropriator, within a reasonable time, takes active " steps to apply said water to another beneficial use.

" A person cannot hold the right to use water against " the subsequent appropriator by an intent formed in " the mind to, at a future date, put the water which he " has ceased to use to another and different purpose or " use, unless he begins active work upon the new use " within a reasonable time after he has ceased to use the " water for the original purpose, and prosecuted the " same diligently to a conclusion. The law does not " permit a person to hold water for speculative purposes, " and no matter how good the intentions of the appropri- " ator may be to use water for a beneficial purpose in " the future, still, he is only allowed a reasonable length

" of time, consistent with the magnitude of the work " necessary to use the water, and his diligent and rea- " sonable exertions to complete the work."

XLIII.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to wit :

" By Act of Congress, the Government of the United " States has given to the appropriators and users of " waters the right to run their canals and ditches over " the vacant and public lands of the United States. " The right to run canals and ditches does not give the " party building the same any title to the land, except " the right of way across it. The right is merely an " easement and continues only so long as the ditch is ' used to convey water for a needful and beneficial pur- " pose, and whenever the party who built the ditch, or " his successors in interest, ceases to use the same, for an " unreasonable length of time, for the purpose of con- " veying water to be used for a needful purpose, then the " rights of the party who built the ditch, or his succes- " sors in interest, ends, and any person may enter into " and upon said ditch, and use the same to convey water " for the purpose of applying it for a beneficial use, and " the party who built the ditch, or his successors in in- " terest, cannot complain."

XLIV.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to wit :

" The test of the right to water in this State is gov-

" erned by appropriation, use, and nonuse. The right of " a party to use water for a beneficial purpose continues " as long as the water is actually applied to that use, or " to some other beneficial use, and terminates when " the use is discontinued. The original use, however, " cannot be changed by the original appropriator or his " successor in interest to the detriment of a subsequent " appropriator, nor can the original appropriator or his " successors in interest assert, against a subsequent " appropriator, his intent to change the use of the water " to another purpose, which will be injurious to a subse- " quent appropriator, unless the first appropriator has " done some act and used due diligence within a reason- " able time towards the making of said change prior to " the appropriation of said water by another person. If " the purpose for which the water was originally appro- " priated has failed, the first appropriator cannot hold " that water indefinitely for any other purpose, unless " he takes active steps to do so within a reasonable time, " and before others have appropriated the water. The " doctrine is that no man shall act upon the principle of " the dog in the manger, either in the appropriation of " water, for which he has no present use, or in the hold- " ing of water which he has ceased to use."

E. W. McGRAW,

Attorney for Defdt.

[Endorsed]: Filed December 30, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING CO., Plff,

vs.

INTEGRAL QUICKSILVER MINING CO., Deft.

Order Affixing Amount of Bond.

Ordered: That the bond of defendant on Writ of Error be, and the same is hereby, fixed at five hundred dollars, and if supersedeas be sought, in one thousand dollars additional.

San Francisco, Jan. 21, 1896.

McKENNA,
Judge.

[Endorsed]: Filed January 21st, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING CO.,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING CO.,
Defendant.

Bond on Writ of Error.

Know all men by these presents, That we, Edward W. McGraw, of Alameda County, California, as principal, and Joseph Sloss and W. H. Palmer, as sureties, are held and firmly bound unto the Altoona Quicksilver Mining Company (a corporation), in the full and just sum of five hundred dollars, to be paid to the said Altoona Quicksilver Mining Company, its attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this — day of January, in the year of our Lord, one thousand eight hundred and ninety-six.

Whereas, lately at a session of the Circuit Court of the United States, for the Northern District of California, in a suit depending in said Court between the Altoona Quicksilver Mining Company plaintiff, and the Integral Quicksilver Mining Company defendant, judgment in

ejectment was rendered against the said Integral Quicksilver Mining Co., and the said Integral Quicksilver Mining Co. having obtained from said Court an order allowing a writ of error, and also a writ of error to reverse the judgment in the aforesaid Court, and a citation directed to the said Altoona Quicksilver Mining Co. is about to be issued, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the twenty-first day of February next.

Now, the condition of the above obligation is such, that if the said Integral Quicksilver Mining Company shall prosecute its Writ of Error to effect, and shall answer all costs that shall be awarded against it if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD W. MCGRAW, [SEAL]
JOS. SLOSS, [SEAL]
W. H. PALMER. [SEAL]

UNITED STATES OF AMERICA,
Northern District of California, } ss.
City and County of San Francisco.

Joseph Sloss and W. H. Palmer, being duly sworn, each for himself, deposes and says, that he is a householder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JOS. SLOSS,
W. H. PALMER.

Subscribed and sworn to before me this 21st day of January, A. D. 1896.

[SEAL] LINCOLN SONNTAG,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Bond on Writ of Error. Form of bond and sufficiency of sureties approved. Joseph McKenna, Judge. Filed Jany. 22d, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING CO.,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING CO.,
Defendant.
No. 11872.

Certificate to Transcript.

I, W. J. Costigan, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing written pages, numbered from 1 to 161, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that the cost of the foregoing return to Writ of Error is $96.\frac{80}{100}$, and that said amount was paid by the Integral Quicksilver Mining Company.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 25th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL] W. J. COSTIGAN,

Clerk United States Circuit Court, Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA—SS.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the Integral Quicksilver Mining Company, plaintiff in error, and Altoona Quicksilver Mining Company, defendant in error, a manifest error hath happened, to the great damage of the said Integral Quicksilver Mining Company, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-

ment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 21st day of February next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of January, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL] W. J. COSTIGAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by

JOSEPH McKENNA,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 22nd day of January, 1896.

C. W. CROSS,

Attorney for Defendant in Error.

Return to Writ of Error.

The answer of the Judges of the Circuit Court of the

United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[SEAL.] W. J. COSTIGAN,
Clerk.

[Endorsed]: Writ of Error. Filed Jany. 22nd, 1896. W.J. Costigan, Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Altoona Quicksilver Mining Company, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 21st day of February next, pursuant to a Writ of Error filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 11872, and entitled the Altoona Quicksilver Mining Company, plaintiff, vs. Integral Quicksilver Mining Company, defendant, wherein said Integral

Quicksilver Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this 22d day of January, A. D. 1896.

JOSEPH McKENNA,
Judge.

Service of within citation and receipt of a copy thereof, is hereby admitted this 22nd day of January, 1896.

C. W. CROSS,
Attorney for Defendant in Error.

[Endorsed]: Citation. Filed Jany. 22d, 1896.
W. J. Costigen, Clerk.

[Endorsed]: No. 280. In the United States Circuit Court of Appeals, for the Ninth Circuit. Integral Quicksilver Mining Company, Plaintiff in Error, vs. Altoona Quicksilver Mining Company. Transcript of Record. In Error to the Circuit Court of the United States for the Northern District of California.

Filed January 25, 1896.

F. D. MONCKTON,
Clerk.

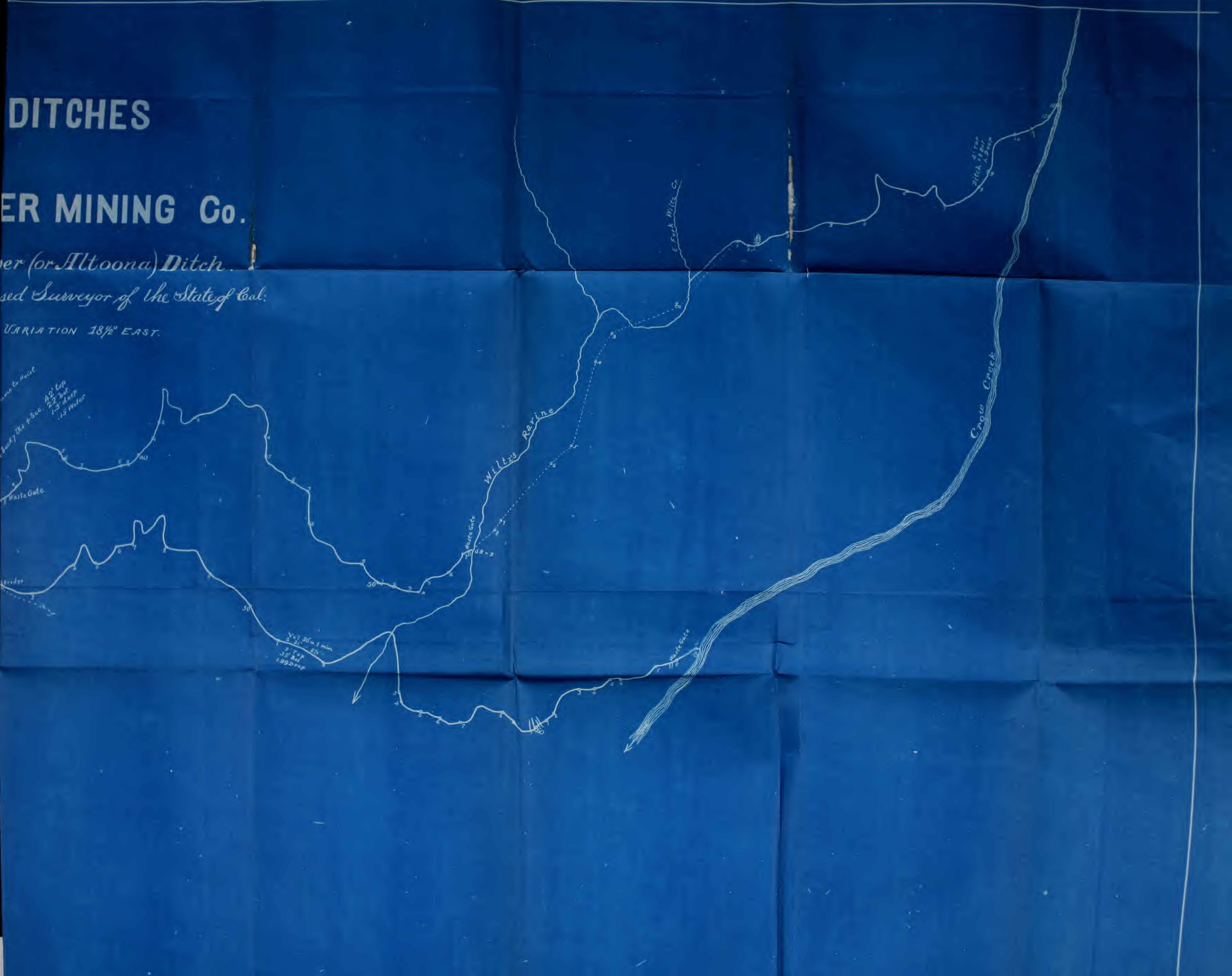
MAP OF WATER

of the ALTOONA QUICKSILV

Showing Upper (or Boston) Ditch and Lo

Surveyed July 27th 1895 by J. M. Graves Lice

SCALE 400 ft. - 1 in.


DITCHES
ER MINING Co.
er (or Altoona) Ditch.
sed Surveyor of the State of Cal:
VARIATION 18½° EAST.
42' top
22' bot
1.3' deep
.15' Water
Waste Gate
Bridge
Wiltz's Ravine
E. Fork Wiltz Cr.
Waste Gate
Waste Gate
Crow Creek


MAP
OF
CINNABAR
MINING DISTRICT
IN
TOWNSHIP 38N. R6W. M.D
TRINITY CO
CAL.
Scale 10 Chains to one inch
Made By
SENTINEL
INVINCIBLE
ENDURANCE
TRINITY No 2
TRINITY No 1
TRINITY No 1
TAGGART
RUINS
CAMPANIA
PARK
ASSURANCE
VANDIC
CALEDONIA
ROCHESTER
OLIVE
BIG BUN
AMERICA
DICKERSON
CUNARD
ATLANTIC
Ridge
Road
Creek
North Fork Trinity River

No. 280.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING COMPANY,
Plaintiff in Error,

vs.

ALTOONA QUICKSILVER MINING COMPANY,
Defendant in Error.

Brief of Plaintiff in Error.

E. W. McGRAW,
Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING COMPANY,

Plaintiff in Error.

vs.

ALTOONA QUICKSILVER MINING COMPANY.

Defendant in Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Defendant in error brought suit in ejectment for a mining ditch in Trinity County, California, and for the water rights appurtenant not only to said Boston ditch but to another ditch known as the Altoona ditch, alleging title and ouster, and for five thousand dollars damages.

The complaint alleges that the value of said Boston ditch and of said waters and water rights is more than two thousand dollars.

The ~~amended~~ answer denied all ownership of the plaintiff below in the Boston ditch or water rights in

question, denied any damage, claimed title to the ditch and water rights, denied ouster, pleaded the statute of limitations; alleged abandonment, of the Boston ditch in 1873, a valid location thereof, thereupon by predecessors of defendant in said action (plaintiff in error here).

Trial was had before a jury, numerous exceptions were taken to the rulings of the Court as to the admission of evidence and to the instructions given to the jury by the Court, which exceptions will be considered in detail in their proper place.

The questions involved in the case are:

1st. What acts are necessary to procure and hold title to mining ditches constructed on public lands of the United States.

2nd. What evidence was pertinent and admissible to establish the issues in this case.

3rd. Is the action of ejectment maintainable for a water ditch or water rights.

ASSIGNMENTS OF ERROR.

The plaintiff in error, in accordance with the rules of the Court, makes the following assignments of error.

I.

The plaintiff offered in evidence the Notice of Location of the Trinity Mining Claim by John A. Lytle, A. W. Hawkett and James McK. Crow, dated August 8th, 1872, and recorded in the office of the Recorder of Trinity County, California, August 15th, 1872; to the introduction of which Notice in evidence defendant objected on the ground that the same was irrelevant, incompetent and immaterial. Objection was overruled by the Court, (Transcript, p. 24) to which ruling of the

Court defendant, by its counsel, then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

II.

Plaintiff offered in evidence a deed dated August 1st, 1873, from James McKinley Crow to John Gray, of Crow's interest in the Trinity Mine, acknowledged the same date, recorded in the County Recorder's office of Trinity County, August 4th, 1873. Also a deed from John Gray to David McKay of the same interest, dated August 2, 1873, acknowledged the same date, and recorded in the County Recorder's office of Trinity County, August 4, 1873. Also a deed of the same property from David McKay to Fred. H. Loring and Augustus Rumfeldt, dated September 23, 1874, acknowledged the same date, and recorded in the County Recorder's office in Trinity County, September 28, 1874. Also a deed of the same interest from Rumfeldt and Loring to A. W. Hawkett and J. A. Lytle, dated October 5, 1874, and acknowledged the same date, and recorded in the County Records of Trinity County, October 19, 1874. To each of which conveyances defendant objected on the ground that the same were irrelevant, immaterial and incompetent; which objections were overruled by the Court, (Transcript, p. 25) to which rulings of the Court defendant, by its counsel, duly excepted; and the said ruling of the Court is hereby assigned as error.

III.

Plaintiff offered in evidence Notice of Location of the Altoona Mine by John A. Lytle, dated September 20th, 1874, and recorded in the office of the Recor-

Trinity County, October 15th, 1874; which was objected to by defendant as immaterial, irrelevant and incompetent. Objection was overruled by the Court; (Transcript, p. 32) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

IV.

Plaintiff offered in evidence a series of mesne conveyances: A deed from John A. Lytle to Philip W. McCarthy of the undivided one-tenth of the Trinity Quicksilver mine, dated October 17, 1874, acknowledged the same date, and recorded in the County Recorder's office at Trinity County, October 23, 1874. A deed from Lytle and McCarthy to Marks Zellerbach, dated July 1, 1875, of the undivided one-half of the Trinity claim as located by Hawkett, Crow and Lytle, acknowledged July 7, 1875, and recorded, July 19, 1875, in the Recorder's office of Trinity County. Also a deed from A. W. Hawkett to Marks Zellerbach, dated August 13, 1875, acknowledged the same date, and recorded in the County Records of Trinity County, August 16, 1875, which deed purports to convey one-half of the Altoona mine, one-half of the Trinity mine, and one-half of the Crow Creek ditch. Also deed from Lytle, Hawkett and McCarthy to Zellerbach, dated September 8, 1875, acknowledged the same date, and recorded September 24, 1875, purporting to convey the Altoona claim, the Trinity claim, and the Crow Creek ditch and water rights; to each of which said conveyances defendant, by its counsel, objected on the ground that it was immaterial, irrelevant and incompetent. (Transcript, p. 33.) The [illegible] ions were overruled by the Court; to which rulings

of the Court defendant by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

V.

Plaintiff offered in evidence the deed, dated August 16th, 1877, by which the Boston Cinnabar Mining Company conveys to the Altoona Quicksilver Mining Company, in consideration of five hundred dollars, that certain ditch situated in Trinity County, State of California, commencing at the Crow Creek and running thence to the Wiltz ravine, and thence to the mining property of the party of the first part, to wit: the Boston Cinnabar Mining Co., the same being one and a half miles long, more or less, and known as the Boston Cinnabar Mining Company's ditch, which deed was duly acknowledged August 16, 1877, and recorded in the County Records of Trinity County, August 20, 1877.

The deed was objected to by defendant on the ground, that it was void, as it appeared that it was made after the grantor had ceased to use the water. (Transcript, pp. 40–41) The objection was overruled and deed admitted in evidence; to which ruling of the Court defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

VI.

Plaintiff identified by witness M. D. Butler a letter received by him shortly after it was written, which letter reads as follows:

"JANUARY 10th, 1889.

"MR. M. D. BUTLER,

"Cinnabar.

"DEAR SIR:—

"The Altoona Quicksilver Mining Company hereby "grants you permission to use the water out of the "ditches belonging to the above mentioned company "this spring and until such a time as the company shall "have use for the same, due notice of which you will re- "ceive from the undersigned. In consideration there- "for, you agree to keep the ditches in good order and "repair without any charge to this company. Please "give me in writing your concurrence thereto.

"Yours truly,

"CHARLES ALLENBERG,

"Secretary Altoona Quicksilver

"Mining Company."

To which counsel for defendant objected on the ground that the same was immaterial, irrelevant and incompetent. Objection was overruled by the Court; (Trans., pp. 41–42) to which ruling of the Court defendant, by its counsel then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

VII.

Plaintiff identified by witness Butler a certain letter written and mailed by him at the date thereof and received by Charles Allenberg shortly after, and offered it in evidence, which letter reads as follows:

"CINNABAR MINING DIST.,

"TRINITY CO., JANY. 29, '89.

"CHAS. ALLENBERG, ESQ.,

"DEAR SIR:—

"I am in receipt of yours of 22nd inst., enclosing per-
"mit to use water out of ditches belonging to Altoona
"Quicksilver Mining Company, and in consideration I
"agree to keep said ditches in good order and repair at
"my own expense, and keep possession of same for
"said Company subject to your order.

"Yours truly,

"M. D. BUTLER."

Counsel for defendant objected on the ground that it was immaterial, irrelevant and incompetent; objection overruled; (Transcript, pp. 42–43) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

VIII.

Witness M. D. Butler testified as follows: That in 1890 and 1891 he was operating for the Altoona Quicksilver Mining Company and was their General Manager and Superintendent up there. That the work done on the Loring claim was done with water from the Altoona ditch. I was not there at the time. I only saw what had been done. That about three-fourths of an acre has been sluiced off the Trinity and Altoona claims. That up to the time witness left, the ledge had been worked to the depth of 120 feet, and there was 800 or 900 feet of tunnel in hard rock.

Plaintiff then asked the following question: Do you

know how much ore had been taken out of that mine up to the time that you left?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled; (Transcript, p. 44) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered as follows: About 12000 flasks of quicksilver from the Altoona and Trinity claims. A flask of quicksilver is 76 1-2 pounds.

IX.

Counsel for plaintiff then asked said witness, M. D. Butler: Do you know what the value of quicksilver has been during those times?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled by the Court; (Transcript, p. 44) to which ruling defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

Witness answered: At one time $115.00 a flask, and from that down to $45.00.

X.

Said witness, M. D. Butler, testified that he had often been in the Altoona mine and tunnel.

Plaintiff asked of said witness the following question: State whether or not the ore body appears on the bottom of the tunnel?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled; (Transcript, p. 45) to which ruling of the Court defendant, by its counsel,

duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered: It does for nearly 600 feet.

XI.

Plaintiff then asked said witness M. D. Butler: How wide is that ore body?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled; (Transcript, p. 45) to which ruling of the Court defendant duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered: It varies from 4 feet to 22 1-2; that was apparent in the bottom of the tunnel. right through there, and all of the work has been done above the level of the tunnel.

XII.

The said witness, M. D. Butler, testified, that he sluiced on the Boston mine in 1886 and 1887 with water from the Boston ditch. That he relocated the Boston mine, September 10th, 1885; and it was after that that he used the water.

Plaintiff then asked the following question: Did you have any controversy with the Superintendent of the Altoona Company about your right to use that water?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled; (Transcript, p 45) to which ruling of the Court defendant, by its counsel, duly excepted: which said ruling of the Court is hereby assigned as error.

The witness answered: I did—with Louis Girard, who was the representative of the Altoona Quicksilver Mining Co., on the ground, about the use of the ditch and wa[illegible]

XIII.

Plaintiff then asked said witness, M. D. Butler: What did he say to you about it?

To which question defendant objected as immaterial, irrelevant and imcompetent; objection was overruled; (Transcript, pp. 45–46) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered: He came on the ditch and told me I must stop using the water of the ditch, that it was the property of the Altoona Company.

XIV.

Said witness, M. D. Butler, further testified: That the defendant took possession of the Boston mine some time in 1891 or 1892. That the witness turned the water out of the Boston ditch, so that it would go down to the head of the Altoona ditch for the purpose of keeping the water running continuously at the Altoona mine on August 9, 1892, and posted a notice that the Altoona Company claimed the ditch and water right and forbidding any person trespassing upon those properties, and also about the 17th of August. I needed all of the water at those times for use on the Altoona mine. That two days after the witness turned the water out of the Boston ditch the McCaws turned it back into the Boston ditch again. That they continued to use it afterwards that season at the Boston mine.

Question by plaintiff: What happened after that between you and any officer of the Integral Company, and what conversations occurred between you and any

officer of the Integral Company with regard to the use of this water if any?

Answer. I met Professor McCaw on the trail one day. He was going out to the railroad and I was coming in. He protested against my interfering with the water, and warned me that if I continued that interference, his gang would string me up.

Counsel for defendant moved to strike the answer of the witness out, because it had nothing to do with the case.

The motion was denied by the Court; (Transcript, pp. 47–48) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

XV.

Plaintiff's witness F. H. Loring testified: That in 1881, 1882 and 1883 he used the water by arrangement with the Altoona Company; also in 1884. In this connection plaintiff offered in evidence a certain agreement, identified by witness having first proved the genuineness of the signature of F. H. Loring and E. L. Goldstein, and also having proved that at that time said Goldstein was President of the Altoona Quicksilver Mining Company.

Counsel for defendant objected to the introduction of said agreement in evidence on the ground that the same was irrelevant, immaterial and incompetent. Objection was overruled by the Court; (Transcript, p. 57) to which ruling of the Court defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

Said agreement reads as follows, to-wit.

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part,

"WITNESSETH: That the said party of the second "part agrees that the party of the first part may have "whatever water belonging to said party of the second "part is requisite for the working of the Quicksilver "Mine of said first party, and may use the iron pipe of "said second party for the purpose of conducting said "water to the mine of said first party, and in considera- "tion thereof the said party of the first part agrees to "give and pay to the said party of the second part "one-third of the net proceeds of the mine of said party "of the first part so worked by him. The party of the "second part is to incur no liability or expense whatever "in case there shall be no proceeds from working said "mine, and the party of the first part is not to pay to "the party of the second part any compensation what- "ever for the use of said water and pipe unless and un- "til after all the expenses of working said mine shall "have been paid out of the proceeds thereof. This "agreement is not to continue after the expiration of the "year 1882.

"IN WITNESS WHEREOF, the party of the first part and "of the second part have executed this instrument the "31st day of May, 1882.

"F. H. LORING,
"Davis Cinnabar Mine.
"E. L. GOLDSTEIN,
"President Altoona Q. Mg. Co."

XVI.

Plaintiff also had identified and proved the genuineness of the signatures, and that at the date of the instrument said E. L. Goldstein was President of the Altoona Quicksilver Mining Company, and offered in evidence a certain agreement; and defendant, by its counsel, objected to the introduction in evidence of said agreement on the ground that the same was irrelevant, immaterial and incompetent. The objection was overruled by the Court; (Transcript, pp. 58–59) to which ruling of the Court the defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

The said agreement reads as follows:

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part,

"WITNESSETH: That the said party of the second part "agrees that the party of the first part may have what- "ever water belonging to said party of the second part "is requisite for the working of the quicksilver mine of "said party, and may use the iron pipe of said second "party for the purpose of conducting said water to the "mine of said first party, and in consideration thereof "the said party of the first part agrees to give and pay "to the said party of the second part one-third of the "net proceeds of the mine of said party of the first part "so worked by him.

"The party of the second part is to incur no liability "or expense whatever in case there shall be no proceeds "from working said mine, and the party of the first part

" is not to pay to the party of the second part any com-
" pensation whatever for the use of said water and pipe,
" unless and until after all the expenses of working said
" mine shall have been paid out of the proceeds thereof.

" This agreement is not to continue after the expira-
" tion of the year 1883.

" In witness whereof, the party of the first, and of the
" second, part have executed this instrument this sixth
" day of March, 1883.

" E. L. GOLDSTEIN,
" President Altoona Quicksilver Mg. Co.
" F. H. LORING.
" Davis Quicksilver Mine."

XVII.

Witness J. F. Cox, on cross-examination, testified:

That while he was Superintendent he put some boxes in the Altoona ditch and covered them over, six inches square. That there was a string of 20 or 30 boxes. That they were put in for the purpose of giving water during the winter months. The boxes were there yet. That they probably extended three hundred feet. They extended from the Altoona ditch to the furnace into two different tanks, 300 feet or a little more. That the water that was coming down the ditch for the last year was water than ran through those boxes. That after putting in the boxes he filled in the ditch on each side and covered the boxes over to prevent the water from freezing.

On re-direct examination of said witness, plaintiff elicited evidence tending to prove: That the water carried through those boxes was the water used to supply the engines of plaintiff for steam purposes and to the

condensers for the purpose of condensation. That the boxes were put in the immediate center of the ditch at the extreme lower end of the ditch immediately at the mine.

Counsel for plaintiff thereupon asked the witness the following question:

What other uses could be made of that water at the Altoona mines by the Altoona Company?

Question was objected to by counsel for defendant as immaterial, irrelevant and incompetent. Objection overruled by the Court (Trans., pp. 63–64); to which ruling of the Court counsel for defendant then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: It can be put to pumping, hoisting, producing electric power, and so forth.

XVIII.

Counsel for plaintiff then asked of said witness Cox the following question: State whether or not all those purposes are necessary and useful in the working of the mine?

To which question counsel for defendant objected on the ground that the same was incompetent and immaterial. Objection was overruled by the Court (Trans., p. 64); to which ruling of the Court counsel for defendant then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

To this question the witness answered: They are both necessary and useful.

XIX.

Plaintiff's witness J. M. Gleaves testified: That he had measured the capacity of the Boston and Altoona ditches to carry water. That the capacity of the Boston ditch is 618 inches measured under a 4-inch pressure. The Altoona ditch run its full capacity is about 1,000 miner's inches.

Counsel for plaintiff asked the following question: State to the jury whether or not you made surveys for the purpose of ascertaining the elevation of the lower end of the ditch (the Boston ditch) above the collar of the shaft in the hoisting works of the Altoona mine?

This question was objected to by counsel for defendant as immaterial, irrelevant and incompetent. The objection was overruled by the Court; (Transcript, pp. 70-71) to which ruling of the Court, defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: I took the elevation between the collar of the shaft and the mouth of the Altoona ditch and found about 43 feet difference in the elevation.

XX.

That between the collar of the shaft and the Boston ditch on the point of the little hill above the mine the difference was a fraction less than 162 feet. That the collar of the shaft is the main level of the floor in the hoisting works. That the shaft is used for hoisting ores and for general working purposes of the mine, and for pumping. (Transcript, p. 71.)

All this testimony was given under the objection of

defendant as being incompetent, irrelevant and immaterial, and was admitted by the Court subject to the exception of the counsel for defendant to the ruling of the Court: and the said ruling of the Court is hereby assigned as error

XXI.

Also the following testimony was given under the same objection, ruling and exception: (Transcript, pp. 71–72.)

That there is a cage used for hoisting ore and for taking men up and down in the mine. That it is operated by steam power for that purpose. That it runs perpendicularly. Mining timbers have to go up and down that shaft. That the collar of the shaft is the upper end—the top. That that is where the cages come to the surface and discharge. That the cages are stopped at the collar of the shaft and the cars loaded with ore are run off and taken out where they are placed in retorts and furnaces. That the shaft had been sunk when witness was there about 240 feet. That when witness was there they were drifting or working at the bottom. That when the level at 240 feet had been worked, a good miner would go down and sink the shaft deeper.

And the said ruling of the Court is hereby assigned as error.

XXII.

Louis N. Girard, witness for plaintiff, testified: That in 1886 he had charge of the Altoona mining properties.

Counsel for plaintiff asked the witness the following question:

During the year 1886, did you make any arrangement for the Company with the Butlers in regard to the use of the water of the Boston ditch?

This question was objected to by counsel for defendant as irrelevant, immaterial and incompetent; which objection was overruled by the Court; (Transcript, p. 75) to which ruling of the Court the defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered to this question: I let Mr. Butler use the water for the repairing of the ditch, keeping it up in repair; he agreed to put the ditch in repair for the use of the water. I made that arrangement in the interest of the Altoona Quicksilver Mining Co., as its representative.

XXIII.

Plaintiff's witness, CHARLES ALLENBERG, testified: That he was the General Manager of the affairs of the corporation plaintiff since 1887.

Plaintiff asked said witness the following question:

During that time what has been your intention as the General Manager of the corporation with regard to holding the corporation's rights to these ditches and water rights?

Which question was objected to by counsel for defendant as immaterial, irrelevant and incompetent.

The objection was overruled by the Court; (Transcript, p. 86) to which ruling of the Court counsel for defendant then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Always intended to hold our rights to those ditches.

XXIV.

Plaintiff then asked said witness the following question:

In the same connection, what has been the intention with regard to the Boston ditch and the water right used with the Boston ditch since the date of the deed from the Boston Company to the Altoona Company in 1877?

To which question counsel for defendant objected on the ground that the same was immaterial, irrelevant and incompetent; which objection was overruled by the Court; (Transcript, pp. 86 87) to which ruling of the Court counsel for defendant then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To this question the witness answered: Always intended to hold our right to the ditch and the water right.

XXV.

Plaintiff then asked said witness the following question:

And what in the same connection with regard to the Altoona ditch and the right to divert water through it?

Same objection, ruling and exception. (Transcript, p. 87.) And the said ruling of the Court is hereby assigned as error.

To which question the witness answered: The same.

XXVI.

Plaintiff then asked said witness:

What use could be made of the water through the Altoona and Boston ditches for the purposes of that Company other than what it has actually been appropriated to?

Objected to by counsel for defendant on the ground that it was irrelevant, immaterial and incompetent and purely speculative.

Objection overruled by the Court; (Transcript, pp. 87–88) to which ruling of the Court the defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

Answer: We could use the water for water power, to run our machinery by water power.

XXVII.

Plaintiff then asked said witness the following question:

What advantages would you have as to power when you could bring the water through the Boston ditch over what you would have in bringing the water through the Altoona ditch?

Same objection, ruling and exception. (Transcript, p. 88.) And the said ruling of the Court is hereby assigned as error.

Answer: The difference in the elevation; could get so much more power through the Boston ditch than through the Altoona ditch; the higher elevation gives more pressure.

XXVIII.

Plaintiff then asked the witness the following question:

What benefits would accrue to the Company from using this water for power over obtaining power by other means which could be used?

Same objection, ruling and exception. (Transcript, pp. 88–89.) And the said ruling of the Court is hereby assigned as error.

Answer: It would save us from using steam power, and consequently save a good deal of wood to make steam for the boilers. It would also save an engineer.

XXIX.

Plaintiff then asked said witness the following question:

How much expense per month would it save the Company during such months as it would furnish power?

Same objection, ruling and exception. (Transcript, p. 89.) And the said ruling of the Court is hereby assigned as error.

Answer: It would save some $600 per month during such time as we had the water power.

The counsel for defendant moved to strike out the answer. Motion denied. To which ruling the counsel for defendant then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

XXXI.

Plaintiff then asked said witness the following questions:

Question: Did you see Mr. M. D. Butler in this city during the years 1886 and 1887 from time to time?

Answer: Yes, sir, at my office on Brannan St.

Question: Did you have any conversation with him at those times with regard to the use of the Boston ditch and the water there?

Question objected to by defendant as incompetent, irrelevant and immaterial. Objection overruled. (Transcript, p. 89.) To which ruling of the Court defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

Answer: Mr. Butler came to me on several occasions and asked me for the use of the water for sluicing boxes and some for iron pipes; and I always give him permission to use our water for sluice boxes or iron pipes.

He wanted to use the water on the Boston mines, and naturally wanted to use the water of the Boston ditch. That was the only ditch that would carry the water on that mine so far as I know.

XXXII.

Counsel for plaintiff then offered in evidence the patent of the United States to the Altoona Quicksilver Mining Co., for the Altoona Quicksilver Mining claims, dated June 21st, 1895. Which patent was objected to by defendant as immaterial, irrelevant and incompetent, and as having been issued subsequent to the commencement of this action. Objection overruled. (Transcript, p. 90.) To which ruling of the Court the defendant by its counsel then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

XXXIII.

Said witness Allenberg further testified:

That the Altoona and Trinity Quicksilver mines had not been worked out in 1885. That the steam hoisting and pumping works and the reduction works which are now on that property were built in 1894. That they were commenced about June, 1894, and completed about December, 1894.

Plaintiff then asked the witness the following question:

What amount of quicksilver has the mine produced since that time—since you commenced putting up those works, which you say you commenced putting up about a year ago?

Objected to as immaterial, irrelevant and incompetent, and referring to matters occurring since the commence-

ment of this cause. Objection overruled. (Transcript, p. 85.) To which ruling of the Court, the defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

Witness answered: About $71,000 worth.

XXXIV.

Counsel for plaintiff then asked witness the following question:

To what depth has the mine been worked?

Objected to as immaterial, irrelevant and incompetent. Objection overruled. (Transcript, pp. 95–96.) To which ruling of the Court the defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Two hundred and thirty-one and a half feet.

XXXV.

Plaintiff then asked the said witness Allenberg the following question:

What is and has been the intention of the Company and of yourself as General Manager of the Company with regard to the working and development of that mine since the year 1880?

Objected to as irrelevant, immaterial and incompetent. Objection overruled. (Transcript, p. 96.) To which ruling of the Court the defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Since 1880, we contemplated to work the mine as we are doing now, but we were unable to do so until last year, on account

of litigation between the stockholders of the Altoona Quicksilver Mining Co.

Mr. Campbell, counsel for defendant: I move to strike that answer out. Motion denied by the Court. (Transcript, p. 96.) To which ruling counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

XXXVI.

Counsel for plaintiff then asked said witness the following question:

What amount of money was expended by the Altoona Quicksilver Mining Co. in the operation and development of its properties in the Cinnabar Mining District in Trinity County, California, from the time the Company took possession of the property up to the commencement of this suit?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection was overruled by the Court. (Transcript, pp. 96–97.) To which ruling counsel for defendant then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To which question witness answered: About $257,000.

XXXVII.

The Court erred in charging the jury as follows: (Transcript, pp. 121–123–124.)

"To abandon such right is to relinquish possession "thereof without any present intention to repossess. "To constitute such an abandonment there must be a "concurrence of act and intent, viz: the act of leaving "the premises or property vacant so that it may be ap-

" propriated by the next comer, and intending not to " return."

XXXVIII.

The Court erred in charging the jury as follows: (Transcript, pp. 121–124.)

" The mere intention to abandon if not coupled with " yielding up possession or cessation of user is not suffi- " cient; nor will the non-user alone without an intention " to abandon be held to amount to an abandonment. " Abandonment is therefore a question of fact. Yielding "up possession and non-user are evidences of abandonment, " and under many circumstances sufficient to warrant the " deduction of the ultimate fact of abandonment. But it " may be rebutted by evidence which shows that not- " withstanding such non-user or want of possession the " owner did not intend to abandon it."

XXXIX.

The Court erred in charging the jury as follows: (Transcript, pp. 121–124.)

" Use of the ditch and water by any other person by " permission of the owner is sufficient to maintain the " owner's possession, or right of possession, as though it " were used by the owner."

XL.

Counsel for defendant also excepted to the charge of the Court on the ground that the Court in his charge to the jury omitted one of the elements of abandonment, in this:

" That one of the elements of abandonment is left " entirely out.—that is, no matter how strong the inten- " tion is to use the water, or take the use of the water,

" or continue to use it at another time; still, if at another " time they do not use it or begin to use it, or commence " work looking to the use of it in the near future, that " then is abandonment, no matter how strong their in- " tention in the future is. They must do some active " work applying the water to that use or some other " beneficial use." (Transcript, pp. 124–125.)

And said omission from said charge of the Court is hereby assigned as error.

XLI.

The Court erred in refusing to charge the jury at the request of the defendant, as follows, to-wit (Transcript, p. 125):

" The use required by the Statute to entitle a person " to the waters of a stream must be an actual use for " some beneficial purpose. It is not sufficient under the " law that there be simply a claim to the water without " any use. And if you find from the evidence that the " plaintiff, the Altoona Quicksilver Mining Company, did " not, since the year 1881, use any of the waters that ran " through the Boston ditch, and did not in good faith intend " to use them, but allowed the ditch to go to ruin and " decay, so that the same could not be used as a ditch, " but claimed the Boston ditch and water right for the " sole purpose of preventing others from using said water " for a beneficial purpose, I charge you that such a claim " is not sufficient to entitle the plaintiff to the possession " of said ditch in this action, and you should find for the " defendant upon that branch of the case."

XLII.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to-wit (Transcript, p. 126):

"No appropriation of water can be made for purely "speculative purposes, and the right to use water can "only be acquired for the purpose of applying it to a "beneficial purpose, and as soon as the purpose ceases, "the right to use the water ceases at once, unless the "appropriator, within a reasonable time, takes active "steps to apply said water to another beneficial use.

"A person cannot hold the right to use water against "the subsequent appropriator by an intent formed in the "mind to, at a future date, put the water which he has "ceased to use to another and different purpose or use, "unless he begins active work upon the new use within "a reasonable time after he has ceased to use the water "for the original purpose, and prosecuted the same dili-"gently to a conclusion. The law does not permit a "person to hold water for speculative purposes, and no "matter how good the intentions of the appropriator "may be to use water for a beneficial purpose in the "future, still, he is only allowed a reasonable length of "time, consistent with the magnitude of the work neces-"sary, to use the water and his diligent and reasonable "exertions to complete the work."

XLIII.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to-wit (Transcript, p. 127):

"By Act of Congress, the Government of the United

" States has given to the appropriators and users of " waters, the right to run their canals and ditches over " the vacant and public lands of the United States. The " right to run canals and ditches does not give the party " building the same any title to the land, except the " right of way across it. The right is merely an ease- " ment and continues only so long as the ditch is used " to convey water for a needful and beneficial purpose, " and whenever the party who built the ditch, or his " successors in interest, ceases to use the same, for an " unreasonable length of time, for the purpose of con- " veying water to be used for a needful purpose, then " the rights of the party who built the ditch, or his suc- " cessors in interest, ends, and any person may enter in- " to and upon said ditch and use the same to convey " water for the purpose of applying it for a beneficial " use, and the party who built the ditch, or his successors " in interest, cannot complain."

XLIV.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to-wit: (Transcript, pp. 127, 128.)

" The test of the right to water in this State is gover- " ned by appropriation, use and non-use. The right of a " party to use water for a beneficial purpose continues as " long as the water is actually applied to that use, or to " some other beneficial use, and terminates when the " use is discontinued. The original use, however, can- " not be changed by the original appropriator or his suc- " cessors in interest to the detriment of a subsequent ap- " propriator, nor can the original appropriator or his

" successors in interest assert, against a subsequent ap-
" propriator, his intent to change the use of the water to
" another purpose which will be injurious to a subsequent
" appropriator, unless the first appropriator has done
" some act and used due diligence within a reasonable
" time towards the making of said change prior to the
" appropriation of said water by another person. If the
" purpose for which the water was originally appropriated
" has failed, the first appropriator cannot hold that water
" indefinitely for any other purpose, unless he takes
" active steps to do so within a reasonable time and
" before others have appropriated the water. The doc-
" trine is that no man shall act upon the principle of the
" dog in the manger either in the appropriation of water,
" for which he has no present use, or in the holding of
" water which he has ceased to use."

XLV.

This is an action of ejectment for a water ditch and water rights. Ejectment will lie for neither a water ditch or water rights, and the action should be dismissed.

ARGUMENT.

A large portion of the exceptions to the evidence and of the exceptions to the instructions of the Court, given and refused, are based upon principles which are at the foundation of titles to ditch property on government lands.

Before entering upon the details of our exceptions, we think it will facilitate a proper understanding of the position and claims of the plaintiff in error to briefly recapitulate the facts as disclosed by the evidence, so far as is necessary, to show the bearings of the instructions and

testimony excepted to, and to discuss at such length as need be the fundamental principles underlying the rights and claims of the parties hereto.

THE FACTS.

The Trinity and Altoona mines are quicksilver mines in the Cinnabar District, Trinity County, California, located in 1872 and 1874, and which came into the possession of defendant in error in 1875. These two mining claims, at the time of the trial of the case, had both been patented to defendant in error. As shown by the patents and maps in evidence, the Altoona and Trinity claims are each located in the west half of Sec. 22, T. 38 N., R. 6 W., in Trinity County. They are adjoining claims, extending east and west, each 600 feet wide from north to south, and 1,500 feet long from east to west. The Trinity is the more northerly of the two. Crow Creek is a stream flowing in a southerly course through Sections 14 and 23 and emptying into the east fork of Trinity River in northwest quarter of Sec. 26. Wiltz Gulch is a a stream flowing in a southeasterly direction through the northwest and southwest quarters of Sec. 14 and emptying into Crow Creek, in the northwest quarter of the southeast quarter of Section 14. Prior to 1875, a ditch had been dug to supply the Trinity and Altoona mines with water from Crow Creek and Wiltz Gulch. The ditch commenced at Crow Creek, a little south of the north line of the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 14; thence running in a general southwesterly direction, following the sinuosities of the mountains, it crossed Wiltz Gulch in the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 14 and took

water therefrom; thence extending through the south-west quarter of Sec. 14, across the extreme southeast corner of Section 15 and down through Section 22, upon and across the north half of the Trinity Mine. The defendant in error came into possession of that ditch in 1875, and has held and used it off and on ever since. No question is made as to their title to it. This ditch is known as the Altoona or Crow Creek Ditch.

In the year 1875, M. D. Butler and his associates took possession of some mining gronnd which he called the Boston Mine. It is a claim 600 by 1500 feet; runs from northeast to southwest and lies principally in the south half of south east quarter of Sec. 15, but a small portion of it is in the north half of the ~~south~~ north half of the north-east quarter of Section 22. In 1875, Butler and his associates commenced to build the ditch in controversy known as the Boston Ditch, commencing at the north fork of Crow Creek in northwest quarter of Section 14; thence southwesterly to Wiltz Gulch in same quarter section; thence utilizing Wiltz Gulch as a water way, to a point in northeast quarter of southwest quarter of Section 14, the water was there taken from the Gulch, by a ditch running a little north of west through the north half of the south-west quarter of Section 14, into the southeast quarter of Section 15: thence southwesterly through said quarter section to and upon the Boston Mine.

Butler and his associates conveyed the Boston mine to the Boston Cinnabar Mining Company, (a corporation), in August, 1875, and that corporation completed the ditch which they had begun. In August 16th, 1877, the

Boston Cinnabar Mining Company conveyed the ditch to the defendant in error.

We have not deemed it necessary to refer to the Transcript to support the foregoing allegations of fact as we do not deem it possible that there can be any controversy about them.

As to other facts about to be stated there is some conflict in the evidence and we will cite the Court to the Transcript; but it must be remembered that the only use of the testimony is to illustrate the exceptions, and that no matter how conflicting the evidence may have been on any point, an instruction, not in itself good law, which removed our theory of the facts as disclosed by the evidence from the consideration of the jury, is reversible error. For all purposes of this case the material evidence is that which is most favorable to ~~defendant~~ plaintiff in error.

If our view of the law is correct, however, the conflict in the evidence is not material. It relates chiefly to the use of the Boston Ditch by the defendant in error.

In 1876 or 1877 the Boston Ditch was extended from the Boston mine southwesterly to a point northwest of a reservoir, which reservoir, as shown by the map of plaintiff in error, is a short distance north of the center of Sec. 22. (Witness Horan, Transcript, p. 27; Littlefield, Transcript, p. 35; M. D. Butler, Transcript, p. 40.) A further extension southwesterly is said to have been made in 1879. (Witness Osgood, p. 66.)

One witness who was in the employ of defendant in error from 1875 to 1879, says that in one season and in one only during that time, was water from the Boston Ditch, used by defendant in error, he thinks, in 1878. (Horan, Transcript, pp. 26-28.) Another witness says

the water was used two seasons during that time, but not later than 1878. One season by defendant in error on Altoona Mine and the other season by having a renter, on an outside claim, the Loring claim. (Littlefield, Transcript, pp. 36–37.) Another says they used the water on the Loring claim in 1879, 1880, 1881 and 1883. (Osgood, Transcript, pp. 66–67.) Another that there was no water in the Boston Ditch in 1883 or 1886. (Dack, Transcript, pp. 64–65.) Another, an employee of defendant in error, says: Boston Ditch, after the time he went there in 1879, was never used by defendant in error, and in only one year, 1880, was used at all, and that was on the Loring claim, west of the Trinity and Altoona mines. (Girard, Transcript, pp. 73, 76, 77.) Another that there was no water in the Boston Ditch below the Boston Mine from 1882 to 1892. (M. D. Butler, Transcript, p. 50.) Still another that the ditch was not used by defendant in error in 1878 or 1879 (Carter, Transcript, pp. 101, 102.)

Allenberg, who was from 1875, Manager of the Altoona Quicksilver Mining Co., says that all he ever did in relation to the Boston Ditch since 1878 was simply to claim it and think that at some time he would use it for power; that since 1878 he never tried to get any water through the Boston Ditch down to the Altoona Mine. (Transcript, p. 100.)

So that it is absolutely certain from the testimony that defendant in error never used the ditch in question after 1883, and there is evidence from which the jury, if they had been allowed to pass on the question, might well have concluded that its last use by defendant in error was as early certainly as 1878. This action was com-

menced in December 1893, so that the non-user embraced a period of ten years certainly, with evidence tending to prove that it existed for fifteen years, before the commencement of this action.

The subsequent history of the Boston Ditch is as follows: In 1884, Girard, who was then in charge of the Altoona Mining Co's. property, without any instructions from any one and on his on responsibility cleaned it out. (Transcript, pp. 73, 76.)

In 1883, M. B. Butler relocated the Boston Mine, then long since abandoned, and in 1885, 1886 and 1887, used water from the Boston Ditch upon it. (Transcript, pp. 41, 46, 51, 55) and also in 1888 and up to April, in 1889. (Transcript, p. 54.)

Prior to January, 1889, when Butler was using water out of the Boston Ditch, Girard, Superintendent of the Altoona Co., came up and turned it off, and notified him that it was the property of the Altoona Co., and that Butler could use it only by permit. Butler made some sort of a compromise with Girard by which the Altoona Co., would allow him to use the water. (Transcript, p. 48, 53, 54, 75.) On January 10th, 1889, Butler got a written permit from the Altoona Company to use the water "until such time as the Company shall have use for the same." (Transcript, p. 42.) The permit conclusively shows that defendant in error was not then using the ditch or water and had not then any use for it.

In 1892, McCaw President of the plaintiff in error took possession of the ditch above the Boston Mine, located the water by posting notice, cleaned the ditch down to the Boston Mine, and used the water at the mine. The plaintiff in error took possession of the

Boston Mine in 1891 or 1892. (Transcript, pp. 46, 47.)

In 1888, the Boston Ditch, from the north fork of Crow Creek to Wiltz Ravine was all out of repair. In 1888, no water running through ditch to Boston mine, nor from Boston mine to Altoona mine. (Lytle, Transcript, p. 32.)

From 1882 to 1892 no water flowed through that portion of the Boston Ditch below the Boston mine. (M. B. Butler, Transcript, p. 50.) In 1892 the ditch below the Boston mine was filled with gravel, sand, rocks and trees, and was not in a condition to run water. That portion of the ditch was not in condition to conduct water in any year between 1882 and 1892. In 1882 the ditch above Boston mine could not carry water until cleaned out by witness. (M. B. Butler, Transcript, p. 51.)

Girard, former employee and superintendent of defendant in error, says from 1880 to 1888 no water ran through Boston Ditch below Boston mine, except in 1880, when it was used on the Loring claim, then called the Davis claim. That in 1888 no living man could have put water through the ditch below Boston mine. The ditch was filled up and caved in,—filled with dirt and brush. (Transcript, pp. 73, 77.) In 1888 there were no places where water would run at all. (Transcript, p. 79.)

C. M Butler says from 1887 to 1891 the ditch below Boston mine was filled up with rocks and brush in places. In 1885, ditch in pretty good shape for quite a distance, but no water ran through it. (Transcript, p. 82.)

Carter says in 1892 ditch between Wiltz Gulch and Boston mine out of repair,—not possible to run water through it till it was cleaned out. In 1878 ditch below

Boston mine in pretty fair condition,—no water through it in 1878 or 1879. In 1892 that portion of ditch in bad condition, filled with logs, rocks and brush, and banks caved in. (Transcript, pp. 101, 102.)

Cummings says from 1886 to 1891 no water in Boston Ditch below Boston mine. It would not carry water without being cleaned out. (Transcript, pp 112, 113.)

The ditch was originally wholly on government land, and still is so except where it passes through the Boston Mining claim, which claim has been purchased from the United States by plaintiff in error.

THE LAW OF THE CASE.

The fact being that plaintiff's right of recovery is based on a possession or possible title acquired in 1875, followed by absolute non-user for over ten, and as we claim for over fifteen, years before suit brought, the law pertinent to such facts should have been correctly given to jury. But throughout the trial and in its instructions to the jury, the Court below acted on a mistaken theory as to the law of the case.

The Civil Code of California, which was in force in 1872 and ever since, provides as follows:

Section 1410. "The right to the use of running water flowing in a river or stream or down a cañon or ravine may be acquired by appropriation."

Section 1411. "The appropriation must be for some useful or beneficial purpose, *and when the appropriator or his successor in interest ceases to use it for such a purpose his right ceases.*"

It is singular that up to the trial of this case in the Court below, the construction and application of that

portion of Section 1411, italicised as above, had never been adjudicated by the Supreme Court of California, or by any Court of the United States.

In March, 1895, the Supreme Court of California decided the case of Utt *v.* Frey, 106 Cal., 392, in which, without any reference to or consideration of Section 1411, it said (p. 397):

"The right which is acquired to the use of water by "appropriation may be lost by abandonment. To aban- "don such right is to relinquish possession thereof with- "out any intention to repossess. To constitute such "abandonment there must be concurrence of act and "intent, viz: the act of leaving the premises or property "vacant, so that it may be appropriated by the next "comer, and the intention of not returning. [Citing cases.] "The mere intention to abandon, if not coupled with "yielding up possession or a cessation of user is not "sufficient, *nor will the non-user alone without an inten- "tion to abandon* be held to amount to an abandonment, "etc."

In that case it does not appear that the sections of the Civil Code above cited were called to the attention of the Court: nor were they material to that case. In that case there was no question of cessation of user, as it affirmatively appears that the ditch was in constant use, (p. 398) and we think the italicized language used was merely obiter. However, the Court below, and as it seemed to us, reluctantly, deemed itself bound by that decision; and the rulings of the Court as to admission of testimony and in its instructions and refusal of instructions were based on the law as stated in that decision. Fortunately we are relieved of the necessity to discuss that

opinion, as the same Court has, since the trial of this case in the Court below, construed Section 1411.

We refer to a case which is the first and only case construing that section and which conclusively demonstrates the error of the theory on which this case was tried in the Court below, and the erroneous application which was made of the doctrine of Utt *v.* Frey.

The principle of the decision of this later case must commend itself to Courts of the United States, because it is in harmony with the legislation of the United States.

The doctrine of abandonment set out in Utt *v.* Frey, would incumber the lands of the United States and of purchasers from the United States, for all time to come, with easements held and used only for purposes of speculation, annoyance or blackmail. This doctrine of abandonment, dependent upon intention, was formerly applied to mining claims located on government lands, but Congress utterly abolished it by the Act of May 10th, 1872, now incorporated in Section 2324 of Revised Statutes, which provides that if annual work on a mining claim is not performed in any one year, the claim shall be subject to relocation by third parties. As the old doctrine of abandonment has now no application to mining claims on government lands, it would seem to follow that it can have no application to a mere appurtenant of the claim, such as a mining ditch. It would be a curious result that if A, who takes up a mining claim on U. S. lands, and also takes up water from a U. S. stream and builds a ditch over U. S. land for the sole purpose of working the claim, afterwards suffers the mining claim to be legally relocated, that he can for all time to come, by his mere

intention not to abandon the ditch and water right, prevent the relocator from working his claim.

The case to which we refer, to-wit: Smith *v.* Hawkins, 42 Pac. Rep., 453 (not yet officially reported), does away with the possibility of such injustice.

The material portion of the decision is as follows:

"PER CURIAM: Action begun in October, 1892, to "quiet the alleged title of plaintiffs to a dam, ditch and "water right for the diversion of the waters of Wolf "Creek in Nevada County. As early as the year 1862, "one John Ross was in possession of the ditch, and sold "water from the same. The ditch claimed by plaintiffs "is two-thirds of a mile in length. Its original capacity "was 457 inches of water, though it seems to be now so "filled up as to be capable of carrying about 100 inches "only. Plaintiffs claim in virtue of a deed to them ex-"ecuted by Ross in March, 1888, which, for the purposes "of the decision, we shall assume was sufficient to con-"vey his title to the property in dispute. Since the "year 1875 taxes have been annually assessed against "such property, and paid by Ross and his successors, "the plaintiffs. In 1890 it was leased by plaintiffs to "persons who made no use of it, but who paid two "months' rental therefor, at $15 per month. Defendant "owns a piece of land lying below the head of the Ross "Ditch and riparian to said creek. One-fourth of a mile "of the length of such ditch is on defendant's said land, "and was there constructed before defendant settled on "the same. He having acquired title to the land under "the federal homestead laws, the patent therefor was is-"sued to him in 1891. In 1879 the defendant con-"structed a ditch tapping the creek about 50 feet below

" the Ross dam, and having a capacity of 200 inches of " water under 6-inch pressure; and by that means, for 13 " years next before the commencement of this action, " continuously, uninterruptedly, with a claim of right, " peaceably, and with the knowledge of plaintiffs and " said Ross, defendant diverted such water to the extent " of the capacity of his ditch, and used the same for " agricultural purposes on his said land. For the period " of 5 years and more next before the commencement of " the action, the dam, ditch, and water right claimed by " plaintiffs have not been used by Ross, or any one who " has succeeded to his interest, for any useful or bene- " ficial purpose. Neither he nor they have ever owned " any property below the head of that ditch to which " the water could be applied. For any purpose of pro- " fit, its use was contingent on its sale or rental to " other persons, and this occurred very infrequently.

* * * * * * * * * *

" Plaintiff's predecessor in interest appropriated water " by means of his ditch, and conveyed it over and across " the land of the defendant, which, at the time of appro- " priation, was a part of the public domain. While the " rights of rival claimants and appropriators, as between " themselves, had for a long time been recognized and " adjusted, both by mining custom and adjudications in " the State Courts, it was not until 1866 that they met " with federal cognizance and sanction. In that year the " United States conferred upon those who had or who " might thereafter appropriate water, and conduct the " same over the public land, a license so to do; and fur- " ther provided that all patents granted, or pre-emptions " or homesteads allowed, should be subject to any such

" vested and accrued water rights, or rights to ditches " and reservoirs used in connection with such water " rights, as might have been acquired under or recognized " by the act. Rev. St. U. S., §§ 2339, 2340. An ap- " propriator of water under these circumstances, and " while the land which he subjects to his necessary uses " continues to be part of the public domain is a licensee " of the general government; but, when such part of the " public domain passes into private ownership, it is bur- " dened by the easement granted by the United States " to the appropriator, who holds his rights against this " land under an express grant. In this essential respect, " —that is to say, in the origin of the title under which " the servient tenement is subjected to the use,—one " holding water rights by such appropriation differs from " one who holds water rights by prescription. The " differences are two-fold: A prescriptive right could not " be acquired against the United States, and can be ac- " quired only by one claimant against another private in- " dividual. Again, such an appropriation, to perfect the " rights of the appropriator, does not necessitate use for " any given length of time; while time and adverse use " are essential elements to the perfection of a prescriptive " right. One who claims a right by prescription must " use the water continuously, uninterruptedly, and ad- " versely for a period of at least five years, after which " time the law will conclusively presume an antecedent " grant to him of his asserted right.

" Section 811 of the Civil Code, discussing the ex- " tinguishment of servitudes, declares (subdivision 4): " ' When the servitude is acquired by enjoyment, disuse " thereof by the owner of the servitude for the period

" prescribed for acquiring title by enjoyment extinguishes " the servitude.' That this section cannot in strictness " be applied to rights under such an appropriation as we " have been discussing becomes obvious when, as above " pointed out, it is considered that there is no period " prescribed for acquiring title to such rights. Section " 811, therefore, deals with the extinguishment of servi- " tudes resting upon prescriptive right,—a right vesting " by reason of continued adverse enjoyment. Section " 1411 of the Civil Code declares that the appropriation " must be for some useful or beneficial purpose, and, " when the appropriator or his successor in interest " ceases to use it for such a purpose, the right ceases. " This section deals with the forfeiture of a right by " non-user alone. We say non-user, as distinguished " from abandonment. If an appropriator has, in fact, " abandoned his right it would matter not for how long a " time he had ceased to use the water; for, the moment " that the abandonment itself was complete, his rights " would cease and determine. Upon the other hand, he " may have leased his property, and paid taxes thereon, " thus negativing the idea of abandonment, as in this " case, and yet may have failed for many years to make " any beneficial use of the water he has appropriated. " The question presented, therefore, is not one of ab- " andonment, but one of non-user merely, and, as such, " involves a construction of Section 1411, Civil Code. " That section, as has been said, makes a cessation of " use by the appropriator work a forfeiture of his right, " and the question for determination is, how long must " this non-user continue before the right lapses? Upon " this point the legislature has made no specific declara-

" tion, but, by analogy, we hold that a continuous non-
" user for five years will forfeit the right. The right to
" use the water ceasing at that time, the rights of way
" for ditches and the like, which are incidental to the pri-
" mary right of use, would fall also, and the servient
" tenement would be thus relieved from the servitude.

" In this State five years is the period fixed by law for
" the ripening of an adverse possession into a pres-
" criptive title. Five years is also the period declared
" by law after which a prescriptive right depending upon
" enjoyment is lost for non-user; and, for analogous rea-
" sons, we consider it to be a just and proper measure of
" time for the forfeiture of an appropriator's rights for a
" failure to use the water for a beneficial purpose. Con-
" sidering the necessity of water in the industrial affairs
" of this State, it would be a most mischievous perpetuity
" which would allow one who has made an appropria-
" tion of a stream to retain indefinitely, as against other
" appropriators, a right to the water therein, while failing
" to apply the same to some useful or beneficial purpose.
" Though, during the suspension of his use, other persons
" might temporarily utilize the water unapplied by him,
" yet no one could afford to make disposition for the em-
" ployment of the same, involving labor or expense of
" any considerable moment, when liable to be deprived
" of the element at the pleasure of the appropriator, and
" after the lapse of any period of time, however great.
" The failure of plaintiffs to make any beneficial use of
" the water for a period of more than five years next pre-
" ceding the commencement of the action, as found by
" the Court, results, from what has been said, in a forfeit-

" ure of their rights as appropriators. The judgment and " order are reversed."

The foregoing decision exactly fits this case. The cases are parallel. The defendant in this case, plaintiff in error here, like the defendant in that, had, since the ditch was constructed purchased from the United States a portion of the land, to-wit: the Boston mine, over which the ditch in controversy was laid out. (See Receiver's Certificate of Purchase. (Transcript, p. 107.)

In this case as in that the plaintiff for a long series of years had made no use of the ditch, and sought to maintain its right by infrequent rental to other persons.

That the instructions given in the Court below, and the refusals to instruct were error, appears to be incontestable. They all antagonize the doctrine of Smith *v* Hawkins.

The instructions excepted to in our assignments of error, XXXVII and XXXVIII. are almost an exact reproduction of the decision of the Supreme Court of California, in

Utt *v.* Frey, 106 Cal., 397, 398.

The *obiter* of that decision: "nor will the non-user alone without an intention to abandon, be held to amount to an abandonment," is reproduced in its exact language in the instruction excepted to in our assignment XXXVIII.

But the later decision of the same Court in Smith *v.* Hawkins, holds that under the Statutes of California, right to a ditch is forfeited by non-user alone, in the absence of any intent to abandon. It is true the Court does not class non-user as a species of abandonment, but the classification is merely technical. When a jury is

instructed as it was in this case that a right once acquired can be lost only by abandonment, and that non-user alone was not abandonment, it must be manifest that the Court meant the jury to understand, and that the jury did understand, that the fact of non-user, no matter how long continued or ~~more~~ here definitely proved, had no effect on the rights of the plaintiff below.

The attention of the Court was specifically called to this matter by our assignment Number XL *ante*.

The instruction excepted to in our assignment XXXIV is clearly irreconcilable with Smith *v.* Hawkins,—the instruction being as follows:

"Use of the ditch and water by any other person, by permission of the owner, is sufficient to maintain the owner's possession, or right of possession, as though it were used by the owner."

The instruction asked by us and refused, embodied in our assignment of error XLI, is strictly in accordance with the doctrine of Smith *v.* Hawkins, and we have already shown that, under the testimony in this case, it was applicable and pertinent to the issues.

The same comments apply to the instruction asked by us and refused, embodied in our assignment XLII, and also to the instructions asked and refused and embodied in our assignments XLIII and XLIV.

ERRONEOUS RULINGS AS TO EVIDENCE.

Assignments I, II, III, IV, are all founded on the introduction of the paper title to the Altoona and Trinity mines. The title to those mines was not in issue, and could in no way throw any light upon the title to the Boston Ditch in controversy here, as the plaintiff below

did not claim to have acquired any title to the Boston Ditch until long after the date of the latest deed admitted in evidence over our objection. It is difficult to surmise any theory upon which the admission of those documents can be justified.

Assignments VI and VII relate to a proposition from the plaintiff below to M. D. Butler, in 1889, to use the water "out of the ditches belonging" to said plaintiff, and acceptance of the proposition by Butler. These documents were clearly irrelevant and immaterial under the doctrine of Smith *v.* Hawkins.

There is no pretence of any use of the Boston Ditch by plaintiff below for a good deal more than five years prior to the dates of those documents. If it ever had any right thereto, it had long before been forfeited by non-user, and these documents could not revive the right. Under any aspect of the case, they were immaterial and inadmissible.

Assignments VIII, IX, X, XI, relate to the admission in evidence of the opinion of Mr. Butler as to the indications upon, and the product of, the Altoona and Trinity mines. The testimony had as little to with the issues involved in this case, as to a question involved in the next transit of Venus. Upon what theory the testimony was admitted is not apparent. It may have afforded place for the counsel for plaintiff to argue to the jury with sonorous eloquence, that to him who hath should be given, and that a company which had prodigiously rich mines should be awarded all the surrounding country.

Assignments XII and XIII relate to the admission in evidence of a controvery between the witness Butler and the superintendent or manager of defendant in error at

some time after 1886. The evidence was clearly inadmissible under doctrine of Smith *v.* Hawkins.

Assignment XIV relates to the admission in evidence of a controversy between Butler, as manager of defendant in error, and McCaw, president of plaintiff in error. It seems that after plaintiff in error had taken possession of the ditch in controversy and was putting it to a beneficial use, Butler turned the water out of it, and McCaw told him if he repeated the offence he would have him strung up. On no possible theory could that testimony be relevant. It could have no effect upon the rights of the respective parties, and could have been introduced for no other purpose than to afford counsel an opportunity to prejudice the jury by denouncing the agents and employees of plaintiff in error as lawless desperadoes, etc. It is not necessary to rehearse that class of oratory. It is familiar to all.

Assignments XV and XVI relate to the introduction in evidence of two agreements between the defendant in error and one F. H. Loring, one in 1882 and the other in 1883, by which Loring was given the use of the "water belonging to" said defendant in error for use in the "Loring" claim—a claim which adjoined and was west of the Altoona and Trinity claims.

The evidence was clearly incompetent under doctrine of Smith *v.* Hawkins.

Assignments XVII and XVIII relate to testimony of J. D. Cox. He had testified as to uses to which the water of the Altoona ditch had been put by defendant in error since the commencement of this action. He was then asked what other uses that water could be put to, and

having answered, was asked if such uses were necessary and useful.

The questions related only to the Altoona ditch, as to which there is no controversy. But if they had related to the Boston ditch, it must be apparent that possibilities of use in 1894 and 1895 could throw no light on the title of the parties in 1892 and 1893.

Assignments XIX, XX, XXI relate to the same class of testimony as enumerated in the last assignment—to wit, the possibilities of uses of the Boston ditch by defendant in error in 1894-5.

Assignment XXII relates to the admission in evidence of the testimony of Girard that in 1886 he, as superintendent of defendant in error, gave Butler permission to use the Boston ditch. It was clearly irrelevant under Smith *v.* Hawkins.

Assignment XXIII. Allenberg, manager of defendant in error from early days, was asked "What has been *your* intention as general manager of the corporation with regard to holding the corporation's rights to those ditches and water rights?"

The question was immaterial and irrelevant on two grounds.

1st. If intention to use the ditch in question could be material, it would be the intention of the corporation and not that of its manager. The intention of a servant of a corporation, not accompanied by acts, can under no circumstances be held to be the intention of the master: though the authorized acts of the servant may throw light on the intention of the master.

2nd. The intention, expressed or unexpressed, even

of the corporation, was immaterial under the doctrine of Smith v. Hawkins.

Assignments XXIV and XXV were exceptions to questions of the same character as the last.

We add to our remarks under last assignment that if it was the intention of the *corporation* that was sought to be elicited, the testimony of the witness was incompetent. As corporations have no souls, so they have no minds. There cannot be such a thing as an "intention" of a corporation, not expressed by some corporate act.

Assignments XXVI, XXVII, XXIX, XXX, concern questions asked Allenberg as to possible uses by defendant inerror of the Boston Ditch, and soliciting guesses from the witness as to the possible mining value of the Boston Ditch to defendant.

The witness was profoundly ignorant as to all those subjects and his answers were mere guesses and conjectures He had never had a survey made of the Boston Ditch until after this suit was commenced; never had any measurements taken as to fall of the water in that ditch until after suit commenced; never had any estimate made of the amount of water that could be gotten through the ditch at different seasons of the year; he did not know whether a small or large amount of water could be got through; he never made any efforts to ascertain whether there could be sufficient water to run machinery. (Transcript, p. 99.)

But aside from all this, possible or even intended uses of water, had no tendency to disprove non-user for ten years or more before the action was commenced and evidence thereof was immaterial and irrelevant under the doctrine of Smith v. Hawkins.

Assignment XXXI concerns testimony of Allenberg as to applications of Butler for permission to use water of Boston Ditch in 1886–7. It is the same class of testimony as that excepted to and set forth in previous assignments.

Assignment XXXII was as to introduction in evidence of patents of U. S. for the Altoona and Trinity mines, dated June 21st, 1895, long after this action was commenced. If the title to these mines was material, the plaintiff in an ejectment suit could not prove title acquired after commencement of the action.

Assignments XXXIII, XXXIV, XXXV, XXXVI relate to evidence elicited from witness Allenberg as to the products of the mines of defendant in error, the amount expended in their development, and the intentions of the witness as to the future management. All the questions and answers were utterly irrelevant to the question of title to the Boston Ditch, but served to impress on the minds of the jury that the plaintiff below was a rich and powerful corporation.

THE JUDGMENT ROLL.

On the complaint this action cannot be maintained and the judgment should be reversed with direcitons to dismiss the action.

This is an action of ejectment for the Boston ditch and for water rights.

The right to the use of water is an incorporeal hereditament for which ejectment will not lie.

" Oil is a fluid like water: it is not the subject of property except while in actual occupancy. A grant of water

has long been considered not to be a grant of anything for which an ejectment will lie."

Dark *v.* Johnston, 93 Am. Dec., 732.

S. C., 55 Pa. St., 164.

Ejectment will not lie for a fishery or diversion of a water course.

Black *v.* Hepburn, 2 Yeates Pa., 333.

The appropriator of water has no title therein except perhaps as to the limited quantity, which may be flowing in his ditch.

Wheeler *v.* Irrigation Co., 3 Am. St., 605.

S. C., 10 Colorado, 582.

Kidd *v.* Laird, 15 Calif., 179, 180.

The adjustment of conflicting rights to water is a proper subject only for a Court of Equity.

City of Salem *v.* Salem F. M. Co., 12 Oregon, 387.

Olmstead *v.* Loomis, 9 N. Y., 423.

A ditch is nothing more than an excavation in the ground. It is a watercourse. A watercourse is defined to be a channel or canal for the conveyance of water. It may be natural, as when it is made by the natural flow of water caused by the general superficies of the surrounding land, from which the water is collected into one channel, or it may be artificial, as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands from which it will not flow in consequence of the natural formation of the surface of the surrounding land.

Earl *v.* DeHart, 72 Am. Dec., 398.

S. C., 1 Beasley's Ch., (N.J.,) 280.

Hawley v. Shelton, 33 Am. St., 942.

S. C., 64 Vt., 491.

Chamberlain v. Hemmingway, 33 Am. St., 332.

S. C., 63 Conn., 1.

It is well settled that ejectment will not lie for a water course.

Swift v. Goodrich, 70 Cal., 106–7.

Black's Pomeroy on Water Rights, Sec. 75.

Newell on Ejectment. p. 54.

In Tibbets v. Blakewell, 35 Pac. Rep., 1007, not officially reported, ejectment was brought for a strip of land six feet in width. The land was the property of the plaintiff. Defendant denied the ouster. It appeared from the evidence that a water ditch was located on the strip of land. The only evidence of ouster was evidence that defendant had diverted and appropriated the water of the ditch. The Supreme Court of California held that this was no ouster, but a mere trespess for which an action for damage would lie.

The basis of an action of ejectment is an ouster. If there can be no ouster there can be no ejectment and if appropriation and diversion of ~~ouster~~ water from a ditch is not ouster, it is difficult to conceive what act would constitute ouster as to ditch property.

Respectfully submitted,

E. W. McGRAW,

Attorney for Appellant.

No. 280.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING COMPANY,
Plaintiff in Error,
vs.
ALTOONA QUICKSILVER MINING COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

C. W. CROSS,
Attorney for Defendant in Error.

Filed February....., 1896.

Clerk U. S. Court of Appeals.

No. 280.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING CO.,
Plaintiff in Error,

vs.

THE ALTOONA QUICKSILVER MINING CO.,
Defendant in Error.

Brief of Defendant in Error.

The defendant in error brought its action of ejectment, in the U. S. Circuit Court in and for the Ninth Circuit, Northern District of California.

Pleadings.

The complaint alleged:

1. The due incorporation of the parties.

2. The residence of the plaintiff in the Northern District of California, and the residence of defendant outside of the State of California.

3. The value of the property involved to be more than $2000.

4. That the properties involved in the litigation are real estate situated in the Northern District of California.

5. That the plaintiff was the owner and entitled to the possession of two certain water ditches, known as the Altoona (or Crow Creek) Ditch and the Boston Ditch, both of said ditches taking water from Crow Creek and Wiltz Gulch, and conveying said water to plaintiff's mines, known as the Altoona Quicksilver Mines; also the right, by means of said ditches, to take and divert from said Crow Creek and Wiltz Gulch at all times 500 inches of running water, measured under a 4 inch pressure, and to convey the same to said plaintiff's said quicksilver mines, and that plaintiff's said right was the first and prior right to take water from said Crow Creek and Wiltz Gulch, and that for more than five years (the period of the Statute of Limitations applicable to actions to recover possession of real estate in California), viz: for the period of fifteen years prior to the alleged wrongful acts of the defendant, the plaintiff, and its grantors and predecessors in interest, had been in the notorious, exclusive adverse possession of said real estate, claiming the same adversely to all the world.

6. That whilst plaintiff was so in possession of said properties, and on, to wit: August 29th, 1893, the defendant entered into and upon the said Boston Ditch and the water right and took possession thereof, and

ousted and ejected the plaintiff therefrom, and still continues to withhold the same from the plaintiff, etc., to plaintiff's damage, etc.

The plaintiff in error, by its answer

1. Denied plaintiff's ownership and right of possession of both of said ditches, and of plaintiff's right to divert water from Crow Creek or Wiltz Gulch by means of said ditches or either of them.

2. Denied the ouster, on or about August 29th, 1893, "for the reason that plaintiff had not been in the possession of the same for about 12 years."

3. Admitted that defendant was in possession of the Boston Ditch, and thereby taking the water from Crow Creek and appropriating the same to its own (defendant's) use; and also admitted the holding and withholding by defendant of said property; but denied the wrongful character of such holding or withholding.

4. Alleged the defendant to be the owner of said Boston Ditch, and of the first right to divert the waters of Crow Creek and Wiltz Gulch to the full capacity of said ditch, and to apply said waters to its own (defendant's) uses; and that it (defendant) had been in such possession and user for five years prior to the commencement of the suit.

5. Defendant also specially pleaded that plaintiff had abandoned said ditch and water right, and that after such abandonment defendant, about May 2nd, 1892, duly located and took possession of said ditch and water right as

its own, and, ever since, held, possessed, and owned the same in its own right, etc.

6. Defendant also pleaded the Statute of Limitations.

Issues for Trial.

Thus, by the pleadings, the only real issue between the parties was the ownership and right of possession of the plaintiff to the Boston Ditch, with its appurtenances, viz: the first right to take the waters of Crow Creek and Wiltz Gulch; and, as involved in that issue, the issues of abandonment and the Statute of Limitations.

Trial and Judgment.

The issues of fact were tried by a jury, before Judge McKenna, a verdict rendered for the plaintiff (defendant in error), and a judgment duly entered in favor of the plaintiff (defendant in error) for the Boston Ditch and its appurtenances.

Writ of Error.

A bill of exceptions taken at the trial was duly settled, and the cause comes before this Court upon a writ of error sued out by the defendant (plaintiff in error). (No motion for new trial.)

Assignment of Errors.

The appellant assigns and relies upon forty-four errors. They seem to be too numerous to deal with individually, and counsel for defendant in error submits his views upon them, classified as follows:

Class 1.

Evidence of the ownership by defendant in error and its grantors of the Altoona and Trinity Quicksilver Mining Claims, to which claims the Boston Ditch extended, and on which claims the respondent and its predecessors in interest used the waters diverted by said ditch.

Class 2.

Evidence of acts of ownership and claim of ownership performed by defendant in error upon and as to the Boston Ditch and water right, including the leasing of the same to other parties and the use of the same by such lessees.

Class 3.

Evidence of the value and condition of defendant in error's quicksilver mines, for use in connection with which the respondent acquired, extended, and held the Boston Ditch.

Class 4.

Evidence of the beneficial uses to which the Boston Ditch and water right had been put and could be put upon the quicksilver mines of defendant in error.

Class 5.

Evidence as to the intention of the defendant in error with regard to its ownership and the use of the Boston Ditch and water right.

Class 6.

Instructions and evidence as to the abandonment of ditches and water rights.

CLASS 7.

Instructions and evidence as to the non-user of the Boston Ditch and water rights, and the effect thereof.

CLASS 1.

Evidence of the ownership by defendant in error and its grantors of the Altoona and Trinity Quicksilver Mining Claims, to which claims the Boston Ditch extended, and on which claims the respondent and its predecessors in interest used the waters diverted by said ditch.

To this class belong Assignments of Error Nos. 1, 2, 3, 4, 5, and 32.

The evidence objected to in these assignments of error was admissible for the purpose of showing that the respondent had use for the water upon mining claims which it owned, such ownership being proven by the valid location, holding, and conveyances in a regular chain of title, bringing the title down to itself.

Assignment No. 32 is fully met by the proposition that when a U. S. patent issues for a mining claim it recognizes and confirms all rights and titles from the date of a valid location down to the issuance of the patent. It grants no new rights, but simply incontestably establishes by record precedent rights relating to the location upon which the patent is based. For these purposes, the patent was not to be excluded from the evidence, although it bore date subsequent to the commencement of the suit.

Vide, 98 Cal. 332, *Jacob* v. *Lorenz*.

The necessity and propriety of the evidence of the ownership of these quicksilver mines by respondent is emphasized in the recent opinion of the Supreme Court of Cali-

fornia (*Smith* v. *Hawkins*), from which case counsel for appellant quotes so *in extenso* in his brief. Quoting from the opinion of the Court in that case (*Vide* page 40 of appellant's brief):

"For the period of five years and more next before the "commencement of the action the dam, ditch, and water "right claimed by plaintiffs have not been used by Ross, "or any one who has succeeded to his interest, for any "useful or beneficial purpose. *Neither he nor they have "ever owned any property below the head of that ditch, to "which the water could be applied.*"

But again this evidence was admissible for the purpose of showing that respondent had useful purposes to which to apply the water, viz: to the mining of quicksilver ores upon mines owned by it.

Civil Code of California, Sec. 1411.

Class 2.

Evidence of acts of ownership, and claim of ownership performed by defendant in error upon and as to the Boston Ditch and water right, including the leasing of the same to other parties by defendant in error, and the use of the same by such lessees.

This class includes Assignments of Error Nos. 6, 7, 12, 13, 14, 15, 16, 22, 31, and 39.

In considering Nos. 6 and 7, the Court should read the evidence which shows that, under the written contracts shown under those two assignments, the respondent's lessees used the ditch and water right in dispute until a short time before appellant seized the possession of them.

(*Vide* transcript, middle of page 81, also page 54.) Evidence under Nos. 12, 13, and 22, was also admissible under appellant's plea of abandonment.

The evidence shows that, under written and oral leases from the defendant in error, the Boston Ditch and water right were used various years, to wit: nearly every year from 1876 to the ouster, by different parties. Appellant objects to this. Respondent claims that it is pertinent evidence for two reasons: 1st, It tends to rebut the alleged abandonment; 2nd, Use by the tenant is use by the landlord, and such evidence proves user. Possession by tenant is possession by the landlord.

Cal. C. C. P., Sec. 326.

This doctrine is so well understood and its application so frequent, that we do not deem it necessary to cite further authorities to the point. The other numbers under this class are exceptions to evidence, that whenever any other person, including appellant, attempted to use the Boston Ditch and water right, that the respondent always asserted its ownership of the property, and enforced recognition of its ownership. This evidence was admissible both against defendant's pleas of abandonment and of the Statute of Limitations, or prescription.

Class 3.

Evidence of the value and condition of the quicksilver mines of defendant in error, for use in connection with which the respondent acquired, extended and held and used the Boston Ditch and water right.

Assignments of Error Nos. 8, 9, 10, 11, 21, 33, 34, and 36 belong to this class.

The authorities hereinafter cited show clearly that the Supreme Court of California has not only held this class of evidence admissible, but extremely important, in the class of cases to which the case at bar belongs, and especially where the question of abandonment and appropriation of water for beneficial purposes is involved. The Boston Ditch conveyed water to these mines. To prove the extent and known value of the mines and the large amounts of money expended upon them by respondent was pertinent to the question of whether respondent had in fact. or had ever intended, to abandon the ditch and water right, which formed so essential an element in their operation.

Class 4.

Evidence of the beneficial uses to which the Boston Ditch and water right had been put, and could be put, upon the quicksilver mines of defendant in error.

This class includes Assignments Nos. 17, 18, 19, 20, 21, 26, 27, 29, and 30.

That the defendant in error has used the ditch and water for beneficial purposes, and had still further uses for it in future was pertinent and admissible evidence, and was also evidence tending to rebut any contention of abandonment of the ditch and water right by the defendant in error.

Class 5.

Evidence as to the intention of the defendant in error with regard to the use of the Boston Ditch and water right by it.

This class includes Assignments Nos. 23, 24, 25, and 35. (N. B. There is an error in the figures *1887*, in line 3 of Assignment No. 23. Instead of 1887, it should read *1877*. See transcript, p. 86, lines 9, 10, and 11.)

The intention of the party, where a question of abandonment is involved, is one of the controlling elements. See authorities hereafter cited.

Class 6.

Instructions and evidence as to the abandonment of ditches and water rights.

This includes the assignments under classes 3, 4, and 5; and also Assignments Nos. 37 and 38.

We submit that the charge given by the Circuit Court as to the loss of the right of a prior owner and possessor to a ditch and water right by abandonment was full, clear, direct, and correct (See authorities hereafter cited.) Abandonment involves both act and intention. To clearly understand the portions of the charge assigned as error, it will be necessary for this Court to examine the context of the extracts contained in the assignments of error. (See transcript, pp. 121, 123–4.)

Class 7.

Instructions and evidence as to the non-user of the Boston Ditch and water rights, and the effect thereof.

This includes Assignments Nos. 41, 42, and 44.

A brief statement of the evidence at this point will assist the Court.

The evidence shows that the Crow Creek Ditch, one of the ditches described in the complaint, was the first ditch

built out of Crow Creek, and was completed (see transcript, evidence of Hawkett, p. 23; Horan, p. 26; Lytle, pp. 29–31; Littlefield, p. 34; Butler, p. 39), and took water to the quicksilver mines of defendant in error from both Crow Creek and Wiltz Gulch, and that defendant in error had become the owner and user of said Crow Creek Ditch, water right, and quicksilver mines before the Boston Ditch was commenced. That, in 1875, the Boston Ditch was commenced by Butler and Worland, who also owned the Boston Mine. (See transcript, evidence of Butler, p. 39.) They afterwards sold the Boston Mine and uncompleted ditch to the Boston Cinnabar Mining Company (a corporation), which completed the ditch, and used the water from Crow Creek and Wiltz Gulch, diverted by it, on the Boston Mine. (See transcript, evidence of Butler, pp. 39–40.) That, August 17, 1877, the Boston Cinnabar Mining Co. sold and deeded the Boston Ditch and water right to the defendant in error. (See transcript, pp. 39, 40, and 41.)

That the defendant in error then extended the ditch to its quicksilver mines, and built a reservoir to accumulate the water for its uses, on the line of the ditch above defendant in error's mines (see transcript, evidence of Butler, p. 49; evidence of Osgood, pp. 65 and 66.)

That thereafter the defendant in error and its lessees used the Boston Ditch and water right almost continuously until the Boston Ditch and water right were seized and held by force and threats by the appellant, in 1892.

That the same waters and water rights were used by defendant in error interchangeably between the two

ditches, which were so situated that one of the ditches was available for use upon one portion of the mines of defendant in error, and the other ditch upon other portions of the said mines of defendant in error.

Morris Osgood testified that defendant in error used the Boston Ditch and water right through the seasons of 1879, 1880, 1881, and 1883. (*Vide* transcript, pp. 65 to 69).

C. M. Butler testified to its use by himself and father under agreement with the defendant in error, at the Boston Mine, in 1885, 1886, 1887, 1888, and 1889, and on the Loring Claim in the last of those years. (*Vide* transcript, pp. 81–83.)

M. D. Butler testified to the use of the Boston Ditch and water by defendant in error in 1883, and by himself, by permission and agreement with defendant in error, in 1885, 1886, 1887, 1888, and 1889, up to August 1st. (*Vide* transcript, pp. 41, 42, 43, 45, 46, 48, 49, 51, 53, and 54.)

F. H. Loring testified to use of the Boston Ditch and water in 1881, 1882, 1883, and 1884, by the defendant in error, and by himself under written lease from the defendant in error. (*Vide* transcript, pp. 56, 57, 58, 59, 60, and 61.)

W. B. Littlefield testified to use of the Boston Ditch and water right by defendant in error in 1876, 1877, and 1878, or 1877, 1878, and 1879. (*Vide* transcript, pp. 34, 35, 36, 37, and 38.)

Patrick Horan testified, that while working for the Altoona Company, he used the Boston Ditch and water

right on their mine for three years, and that one of the years was 1878. (See transcript, p. 34.)

Dack testified to the use of the Boston Ditch and water right by the Butlers in 1885 and 1889. (See transcript, evidence of Dack, pages 64 and 65.)

Morris Osgood testified that he was ditch tender for the defendant in error during the years 1879, 1880, 1881, and 1883, being absent from that locality in 1882, and that the Boston Ditch and water right was used through the Boston Ditch by the defendant in error during the years 1879, 1880, 1881, and 1883. (See transcript, pages 66, 67, 68 and 69.)

Allenberg testified to the use of the Boston Ditch and water right by the defendant in error in 1878.

Louis Girard testified that he was superintendent of the defendant in error's properties in the fall of 1884, and that in September, 1884, he cleaned out the Boston Ditch, its entire length, for the defendant in error. That in 1885 the supply of water for the Boston Ditch was not sufficient to use at the Altoona Mine. That the Altoona Company used the Boston Ditch and water right in 1880 on its mines. That in 1886 he, as superintendent for defendant in error, leased the Boston Ditch and water right to the Butlers, who used it for mining until he left the mine in 1889. (See transcript, pp. 73, 74, 75 and 76.)

So the evidence clearly shows the purchase of the Boston Ditch and water right from its previous owner, in 1877, by the defendant in error, and their use by defendant in error and its lessees, until and including

1889, during every water season (undisputed), except 1885, in which year defendant in error had no use for that ditch, but that year cleaned it out its full length.

The plaintiff in error pleads in its answer and claims its right to the Boston Ditch and water right by virtue of a re-location of the same, made May 2nd, 1892. (See transcript, water location, contained in answer of plaintiff in error, pages 13 and 14.)

The evidence shows that the plaintiff in error first turned the water into the Boston Ditch and used it in July, 1892. (See transcript, evidence of Carter, p 102; evidence of McCaw, p. 106.) That August 9th and 17th, 1892, Butler, acting as superintendent of the properties of defendant in error, turned the water away from the Boston Ditch to the Altoona Ditch, and posted notices notifying all parties that the Altoona Company claimed the properties, and not to interfere with it. (See transcript, evidence of Butler, p. 49, and 50, and 54.) N. B. The Loring claim, the El Madre Mine, the Davis Mine, and the claim marked "Ruby" on defendant's Exhibit 2, are the same claim, under different names. (See evidence of Loring, p. 61; evidence of Girard, p. 75; evidence of C. M. Butler, p 82.)

The evidence also shows that, from '77 to '92, the same water right was used interchangeably through the Altoona Ditch on defendant's mine, up to the trial of the suit. (See evidence of Hawkett, pp. 23, 24, 26, and 27; Lytle, pp. 30, 31, and 32; Littlefield, pp. 34 and 35; M. D. Butler, pp. 43, 49, and 81; Dack, pp. 64 and 65; Osgood, pp. 80, 81, and 83; Girard, pp. 73 and 75.)

The Law of Water Rights and Ditches in the State of California, as Declared by the Court of Last Resort in That State.

Appropriation and Right of Appropriator.

7 Cal. 46, *Hoffman* v. *Stone:*

"The first appropriator of water acquires a special "property in the waters thus appropriated, and as a "necessary consequence might invoke all legal remedies "for its defense or use."

12 Cal. 27, *Kimball* v. *Gearhart:*

"Possession or actual appropriation is the test of "priority in all claims to the use of water, where such "claims are not dependent upon the ownership of the "land through which the water flows." (The Riparian right.)

15 Cal. 162, *Kidd* v. *Laird:*

"As to the character of the property which the owner "of a ditch has in the water actually diverted by and "flowing in his ditch, with reference to such water, his "power of control and right of enjoyment are ex- "clusive and absolute, and it is a matter of little prac- "tical importance whether in a strict legal sense it be, "or be not, private property."

25 Cal. 504, *Union Water Co.* v. *Creary:*

"The right to the use of a water course in the public "mineral lands, and the right to divert and use the "water taken therefrom, may be held, granted, aban- "doned, or lost, by the same means as a right of the

" same character issuing out of lands to which a " private title exists."

96 Cal. 214, *Ramelli* v. *Irish:*

"Appropriation upon Public Land—Rights of Appro- " priator Against Purchaser from Government.—The " right to the use of water flowing in a stream over " public lands of the United States may be acquired by " appropriation; and when such appropriation has been " made for some useful or beneficial purpose, the rights " acquired by the appropriator will be recognized and " protected as against any other person who subse- " quently obtains title to the land from the govern- " ment."

32 Cal. 27, *Davis* v. *Gale:*

"A person who has appropriated the water of a stream, " and caused it to flow to a particular place by means of " a ditch, for a special use, may afterwards change the " use to which he first applied the water, and the place " at which he used it, without losing his priority of " right, as against one who has dug a ditch from the " same stream before the change is made.

" One who has appropriated the water of a stream by " means of a ditch for the purpose of working a par- " ticular mining claim, may, after he has worked out the " claim and abandoned the same, extend his ditch and " use the water at other points, and for a different pur- " pose, without losing his priority of right as against " one who afterwards dug a ditch from the same " stream and appropriated water before the claim was " worked out.

"Appropriation and use for a beneficial purpose are "the tests of right to water in the mineral regions, "while the place and character of its use are not such "tests."

67 Cal. 267, *Junkans* v. *Bergin:*

"Point of Diversion May be Changed.—One entitled "to divert a quantity of water from a stream may take "it at any point on the stream, and may change the "point of diversion at pleasure if the rights of other "appropriators be not injuriously affected by the "change."

96 Cal 214, *Ramelli* v. *Irish:*

"Change of Place of Diversion--Change of Use.— "A person entitled to the use of the waters of a stream "by appropriation may change the place of diversion, "or the place where it is used, or the use to which it "was first applied, if others are not injured by such "change."

No Notice of Location of Ditch or Water Right Necessary.

101 Cal., pp. 107 and 112. *Waterson* v. *Saldunbehire:*

"Where there has been an actual appropriation and "use of water, a right to it is acquired, regardless of "the provisions of the Civil Code, for the acquisition "of water rights."

79 Cal. 587. *Conredt* v. *Hill:*

"Code Requirements as to Appropriation.—So far as "defenses to an action for diversion of water are

" founded upon the Statutes of Limitation and equita-
" ble estoppel, it is immaterial whether the defendant,
" or his grantor, made an appropriation of the water in
" compliance with the Code requirements as to posting
" notice, etc., or not. To sustain those defenses, the
" actual construction of the ditch which diverted the
" water may be shown without preliminary proof of
" the posting or recording of notices."

80 Cal. 397. *Necochea* v. *Curtiss:*

" Appropriation by Ditch – Non-Compliance with
" Code—Riparian Rights of Subsequent Pre-emptor.—
" In the Act of Congress of July 16th, 1866, a prior
" appropriator of a water right who diverts water from
" its natural channel, by means of a completed ditch,
" prior to the vesting of any rights in a subsequent pre-
" emptor of the land over which the water would nat-
" urally flow, is protected to the extent and in the man-
" ner of such actual and completed diversion, against
" any riparian rights of the subsequent preemptioner,
" notwithstanding the failure or neglect of the prior
" appropriator to comply with the Civil Code as to the
" posting and recording of a notice of appropriation of
" the water right.

" Construction of Civil Code—Effect of Diversion—
" Subsequent Appropriation.—The object of the legisla-
" ture in prescribing in section 1415 of the Civil Code
" that a notice of appropriation of a water right is to be
" posted and record thereof to be made, and in section
" 1416 that work is to be commenced for diversion of
" the water within sixty days after the posting of the

"notice, and to be diligently prosecuted thereafter, &c., "is merely as declared in section 1418, to enable the "claimant to avail himself of relation as against an "intervening appropriator. After the diversion of the "water has been completed and the same has been ap- "plied to a beneficial use, the appropriator has a perfect "right to the water appropriated against all the world, "except the owner of the soil, and those claiming ad- "versely who have complied with the law. Whether a "subsequent appropriator could, at any time after the "completion of the diversion by the prior appropriator, "take the water away from the latter by complying "strictly with the code is not decided."

83 Cal. p. 10, *Hesperia Land & W. Co* v. *Rogers.*

82 Cal. p. 564, *Burrows* v. *Burrows:*

"Prior Appropriation—Failure to Post and Record "Notice.—The failure to post and record a notice of "appropriation will not vitiate a prior actual appropria- "tion of waters flowing upon the public domain as "against a riparian proprietor who subsequently settles "upon and obtains a patent to land below the point of "diversion."

99 Cal. 756, *Wells* v. *Mantes:*

"Compliance with Code.—One who appropriates the "waters of a running stream by an actual diversion "thereof for the purpose of irrigation, acquires the right "to the use thereof as against the claimant who subse- "quently posts his notices upon the stream in accord- "ance with section 1415 of the Civil Code, and pro- "ceeds thereafter as required by statute to perfect his

" rights, although the prior appropriator has not fol-
" lowed the statute in making his appropriation.

" Object of Code Provisions—Relation.—The scope
" and provisions of the Civil Code upon water rights
" was merely to establish a procedure for the claimants
" of the right to the use of the water whereby a certain
" definite time might be established as the date at
" which their title should accrue by relation, and a fail-
" ure to comply with the rules there laid down does not
" deprive an appropriator, by actual diversion of the
" right, to the use of the water as against a subsequent
" claimant who complies therewith.

" The word 'claimants,' in section 1419 of the Civil
" Code, which provides that the failure to comply with
" the rules of the Code, 'deprives the claimants of the
" 'right to the use of the water as against a subsequent
" 'claimant who complies therewith,' refers to a party
" posting and recording the notices required by the
" provisions of section 1415 of the same Code, and does
" not apply to an appropriator by actual diversion.

The Law of Abandonment.

26 Cal. 263. *St. John* v. *Kidd:*

" Abandonment is purely a question of intention.—An
" abandonment takes place when the ground is left by
" the locator without any intention of returning, or
" making any future use of it, independent of any min-
" ing rule or regulation."

36 Cal. 333. *Moon* v. *Rollins:*

" Mere lapse of time does not constitute an abandon-

" ment, but it may be given in evidence, for the pur-
" pose of ascertaining the intention of the parties."

36 Cal. 214, *Bell* v. *Bedrock Tunnel and Mining Co.:*

" As to support the plea of abandonment, it must ap-
" pear from the evidence that there was a leaving of
" the claim, without any intention of returning, or mak-
" ing any further use of it, so it is competent for the
" opposite party to prove, in rebuttal, any acts explana-
" tory of the leaving which tend to show that it was
" not accompanied with an intention not to return."

8 Montana, 389, *McCauley* v. *McKeig:*

" The evidence in a case involving the right to use
" certain water, showed that the defendant had appro-
" priated the same for placer mining purposes in 1869,
" and that in 1872 the plaintiff had appropriated the
" same for irrigating his land; that during the years
" 1878, 1879, 1880, 1882, and 1883, the defendant had
" not used the said water, but that in certain of said
" years the supply was not sufficient for placer mining
" operations. Held, that there had been no abandon-
" ment by the defendant of his prior right to the use of
" said water."

What Constitutes:

Smith v. *Cushing*, 41 Cal. 97:

" To constitute an abandonment, the premises must be
" left vacant without the intention of reclaiming the
" possession, and open for the occupation of any one
" who may choose to enter."

Judson v *Malloy*, 40 Cal. 299:

"To constitute an abandonment, there must be a concurrence of the act of leaving the premises vacant, so that they may be appropriated by the next comer, and the intention of not returning."

Moon v. *Rollins*, 36 Cal. 233:

"If the person in possession of land leaves it, with the intention of returning, he does not abandon it. An abandonment takes place only when one in possession leaves it with the intention of not again resuming possession. Abandonment is, therefore, a question of intention."

Richardson v. *McNulty*, 24 Cal. 339:

"An abandonment can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself and regardless and indifferent as to what may become of it in the future."

Lawrence v. *Fulton*, 19 Cal. 683:

"Where, in ejectment, the plaintiff asked the court to instruct the jury, 'that lapse of time does not constitute an abandonment, but that it consists in a voluntary surrender and giving up of the thing by the owner, because he no longer desires to possess it, or thereafter to assert any right or dominion over it;' and the instruction was given with the qualification that lapse of time constitutes the material element in the question of abandonment: Held, that it would be more exact to say that lapse of time constitutes

" *a* material element to be considered in deciding the " question of abandonment, but that the instruction " given and the qualification are, in connection, the " the same in effect."

Ferris v. *Coover*, 10 Cal. 589;

Davis v. *Perley*, 30 Id. 630:

" The doctrine of abandonment only applies where " there has been a mere naked possession without title. " Where there is a title, to preserve it there need be no " continuance of possession: and the abandonment of " possession cannot affect the right held by virtue of " the title."

Davis v. *Perley*, 30 Cal. 630.

" Abandonment of land is necessarily a question of " intention, but that intention may be gathered from all " the acts of the party alleged to have abandoned."

What Does Not Constitute:

Moon v. *Rollins*, 36 Cal. 333:

" Mere lapse of time does not constitute an abandon- " ment, but it may be given in evidence for the purpose " of ascertaining the intention of the parties."

Moon v. *Rollins*, 36 Cal. 333:

" If one in possession of land leaves it with the in- " tention of returning, his mere failure to occupy the " land for a period of five years does not necessarily " constitute an abandonment. Until adandoned he may " recover against a trespasser, unless his action has be- " come barred by a five years' adverse possession."

Judson v. *Malloy*, 40 Cal. 299:

"The intention to abandon is not necessarily infer-
" able from the fact that the premises have been left
" vacant, unimproved, and without attention for more
" than five years before the commencement of the action,
" but such facts may be taken into consideration in de-
" ciding the question of abandonment."

Richardson v. *McNulty*, 24 Cal. 339:

"When an abandonment takes place, a vacancy in the
" possession is created, and without such vacancy no
" abandonment can take place."

30 Cal. pp. 193 and 201–2, *Wilson* v. *Cleveland:*

"Upon a question of abandonment, the parties should
" be allowed to prove any fact or circumstance from
" which any aid for the solution of the question can be
" derived."

Hoffman v. *Stone*, 7 Cal. 46:

"A ditch company, who avail themselves of a dry ra-
" vine to conduct their water a portion of the distance
" to their dam, where they use it, do not abandon the
" water thus carried by them, and are entitled to the
" same enjoyment of it as if conducted through an ar-
" tificial ditch."

Morenhaut v. *Wilson*, 52 Cal. 263:

"Where a party was driven away from his mine by
" hostile Indians, left his tools in an adjacent mine, and
" did not return prior to a second location by another
" party, for the reason that he supposed the Indian
" hostilities continued, because of the required expen-

"diture of money, and because he believed he had "done sufficient work upon the mine to hold it: Held, "that there was not that intent necessary to constitute "abandonment."

Stone v. *Geyser Q. M. Co.*, 52 Cal. 315:

"In the trial of an issue as to whether mining "ground had been abandoned by the plaintiff before the "defendant's entry, the fact that the defendant be- "lieved the mine had been abandoned by the plaintiff "when he entered, is not to be taken into consideration "by the jury in determining the issue."

Stone v. *Geyser Q. M. Co.*, 52 Cal. 315:

"The question of abandonment can never arise, ex- "cept when there has been possession, and then the "question is simply whether the possessor intended to "return, and whether he intended to return in good "faith or bad faith."

EVIDENCE OF:

Partridge v. *McKinney*, 10 Cal. 181:

"The law will not presume an abandonment of prop- "erty in a dam and ditch for mining purposes from the "lapse of time."

Keane v. *Cannovan*, 21 Cal. 291:

"An abandonment may, in some cases, be inferred "from the lapse of time, and the delay of the first occu- "pant in asserting his claim to the possession against "parties subsequently entering upon the premises; but "in such cases the leaving of the premises must have

" been voluntary, and without any expressed intention " of resuming the possession."

Keane v. *Cannovan*, 21 Cal. 291:

" The fact that a party, when ceasing to occupy prem- " ises, left an agent in charge of them, is of itself suffi- " cient to rebut the presumption of abandonment, aris- " ing from the cessation of his occupancy, and to render " the question of abandonment one of intention proper " for determination by a jury from the circumstances."

Richardson v. *McNulty*, 24 Cal. 339:

" In an action to recover possession of a mining " claim, where the defense is an abandonment of the " claim by the plaintiff, the judgment roll in an action " brought by the plaintiff against third parties to recover " possession of the same ground, and in which plaintiff " recovered judgment, is admissible in evidence to rebut " the presumption of abandonment.

" In such cases the Court should guard the jury, by " proper instructions, from giving the judgment any " weight in evidence, except upon the question of aban- " donment."

Wilson v. *Cleaveland*, 30 Cal. 192:

" If the plaintiff in ejectment relies upon prior pos- " session, and the defendant attempts to prove aban- " donment by the plaintiff before his entry, the plaintiff " should be allowed a wide range in proving facts and " circumstances to rebut the alleged abandonment."

Roberts v. *Unger*, 30 Cal. 676:

" When, in ejectment on prior possession, abandon-

" ment is pleaded and evidence on it introduced, the " case should be left to the jury."

Bliss v. *Ellsworth*, 36 Cal. 310:

" Evidence tending to show that a party who, upon " proper notification to him as the owner and occupant " of certain lots in an incorporated city, had caused the " streets fronting on the same to be graded, as required " by such notification, is pertinent and material in re- " buttal of a claim that he had abandoned said lots, as " tending to show his continued acts of ownership and " control of the same; also, as tending to illustrate the " character and *bona fides* of his possession of said lots."

EFFECT OF:

93 Cal., p. 519, *Herman* v. *Hunnewill:*

" By discontinuance of use is meaant abandonment."

95 Cal., p. 268, *Aliso Water Co.* v. *Baker*;

96 Cal., p. 228, *Hulsman* v. *Todd.*

ABANDONMENT AMD NON-USER:

106 Cal., p. 392, *397*, *Utt* v. *Frey:*

" Appellant contends that if the plaintiff or his prede- " cessor in interest ever had any irrigation water right " in said ditch, it was lost by abandonment. The right " which is acquired to the use of water by appropriation " may be lost by abandoment. *To abandon such right is* " *to relinquish possession thereof without any present intention* " *to repossess.* To constitute such abandonment, there " must be a concurrence of act and intent, viz: the " act of leaving the premises or property vacant, so that

" it may be appropriated by the next comer, and the " intention of not returning. (Authorities.) The mere " intention to abandon, if not coupled with yielding up " possession, or a cessation of user, is not sufficient; nor " will the non-user alone, without an intention to aban- " don, be held to amount to an abandonment. Aban- " donment is a question of fact to be determined by a " jury, or the Court sitting as such. Yielding up pos- " session and non-user is evidence of abandonment, and, " under many circumstances, sufficient to warrant the " deduction of the ultimate fact of abandonment. But " it may be rebutted by any evidence which shows that, " notwithstanding such non-user, or want of possession, " the owner did not intend to abandon. But little water " was used for several years, and the ditch became ob- " structed so that it would carry but little water. But " that did not constitute abandonment."

The last case cited, viz: *Utt* v. *Frey*, 106 Cal., pp. 329–97, is a very complete exposition of the law of abandonment as to water rights and ditches, and instructions given by the Court on the subject are clearly supported by that decision.

In reviewing the brief of the plaintiff in error, we find that its attorney lays great stress upon the case of *Smith* v. *Hawkins*, 42 Pacific Reporter, page 453, and remarks with seeming candor that the case is in conflict with the rulings and instructions of the Court at the trial of the case at bar. We submit that a careful consideration of the case will show most material differences, and very important ones, in the two cases, and that the case in itself is full authority for the correctness of the action of the

Circuit Court in refusing to give certain instructions asked by the plaintiff in error at that trial, and which refusal to give such instructions is the basis, in part, for this appeal. Counsel for appellant in error seem, in their brief, to have overlooked important features of that case: First, in that case the plaintiff, who claimed a ditch and water right, had neither by himself, nor any tenant, nor any other person in any manner claiming under him, made any use of his ditch and water right for thirteen years next preceding the commencement of his suit. True, he had leased his ditch and water right for two months at $15 a month, which had been paid to him, but such lessee made no use of the ditch or water right. The defendant in that case owned riparian lands below the head of plaintiff's ditch, and had himself constructed a ditch out of the same stream on defendant's own lands, and for more than five years next preceding the commencement of the suit had continuously used his own ditch and water right, consisting of the taking of the waters of said stream through the defendant's ditch; and it was upon that ground that the Supreme Court rendered a decision in favor of the defendant; and all this appears by the quotations from the decision, in respondent's brief (pages 39 to 44). The only other point of importance decided in that case was, that where a man made no use of a ditch constructed over patented lands, for a continuous period of five years, that thereby, under Sections 1411 and 811, subd. 4, of the Code of Civil Procedure of California, he lost his right to the ditch and water right; thereby giving a construction to the following language in Section 1411 of our Code of Civil Procedure, viz:

"And when the appropriator or his successor in in-
" terest ceases to use it for such purpose the right
" ceases."

At the trial of the case at bar, counsel for appellant in error contended that any ceasing to use the ditch and water right, no matter for how short a time, destroyed the appropriator's prior right. This case of *Smith* v. *Hawkins*, cited by counsel, decides that the true construction of that section is, that the cessation of user must continue for five years, unless abandonment be proven In the case at bar the Boston Ditch and water right were used by the defendant in error and its lessees every year, beginning with 1876, up to and including the first day of August, 1889. The plaintiff in error first claimed a right to the ditch and water right May 2nd, 1892, and the defendant in error commenced this action of ejectment on the 4th day of December, 1893, so that there was no possibility of the doctrine announced in that case, as to five years' non-user, becoming applicable to the defendant in error, and during a portion of that time, viz.: from August, 1892, to December, 1893, the defendant in error was kept out of possession of the ditch and water right by force and threats of the officers of the plaintiff in error. (See transcript, evidence of Butler, pp. 47 and 48.) The Circuit Court instructed the jury in clear terms, that "when the appropriator or his succes-
" sor in interest ceases to use the water for a beneficial
" purpose, the right ceases." (See transcript, pp. 120–121.) The jury, by its verdict in favor of the defendant in error, found that it had not ceased to use

the water for a beneficial purpose, and this finding was fully in accord with the case cited by counsel for plaintiff in error, viz: *Smith* v. *Hawkins;* for the evidence clearly showed that the plaintiff had not ceased to use the ditch and water right for a period of five years prior to the commencement of the suit. As the evidence clearly showed—and there was no conflict in the evidence whatever upon the point—that the defendant in error, by its lessees, used the ditch up to August 1st, 1889, there being no conflict, it would not have been error for the Court to refuse to give an instruction, that if the defendant in error had not used the Boston-Ditch and water right for five years prior to the commencement of the suit, that thereby he lost his right, for that there was nothing in the evidence calling for such an instruction; but, furthermore, the plaintiff in error asked for no such instruction.

Specification of Error No. 40 is not well taken, for that it is at variance with the law of abandonment, as shown by the authorities above cited. The authorities are clear, that intention is a strong element in the question of abandonment.

Specification of Error No. 41 is not tenable. The element contained in the first sentence of the rejected instruction was fully given by the Court. (See bottom of page 120 of the transcript.) The element contained in the second sentence is not applicable to the evidence in the case; for the evidence showed a use by the respondent in error and its lessees, year by year, for a period of fourteen years. The elements contained in sentence 3 were not applicable: first, because there was no evidence tending

to show that the Altoona Quicksilver Mining Company did not, since the year 1881, use any of the waters that ran through the Boston Ditch, and also because it left out of consideration entirely the use of the Boston Ditch and water right by the tenants of the Altoona Quicksilver Mining Company. The elements contained in lines 5, 6, and 7, of page 156, of said specification, were not applicable; for there was no evidence tending to show that the respondent in error claimed the Boston Ditch and water right for the sole purpose of preventing others from using such water for a beneficial purpose.

Specification of Error 42. the refusal of the Court to give the instruction found at page 156 of the transcript, was not error. The Court instructed the jury (see page 120) that an appropriation of water must be for some useful or beneficial purpose, and that a cessation of use worked a cessation of the right. The offered instruction was also wrong in leaving it entirely to the jury to determine what constitutes a reasonable time in such cases; for the Supreme Court says, in the case of *Smith* v. *Hawkins*, cited by counsel for appellant, that a mere failure to use, without abandonment, does not cause the right to lapse, unless such cessation continues for five years; and, in that respect, the instruction was erroneous. If the Court instructed upon that point further than it did, it should not have been that a failure to use for an unreasonable time, but that a failure to use for a period of five years, worked a loss of the right. The instruction contained another error, in the sentence: "The law does not permit a person to "hold water for speculative purposes." This was erro-

neous. The decisions of the California courts are, that a party may not hold water for *merely*, or *purely*, speculative purposes, or for speculative purposes *alone*, or *solely*. That portion of the instruction was inapplicable to the case at bar; for that there was no evidence tending to show that the defendant in error held or had attempted to hold the waters for speculative or merely speculative purposes, but showed clearly that its object in holding the waters was for use upon quicksilver mines. The last clause of the instruction was erroneous. In short, there was nothing in the instruction which was not erroneous, which was not included in the charge given to the jury by the Court. The instruction offered by counsel for plaintiff in error, and refused by the Court, and contained in Assignment of Error No. 43, was correctly refused. The case of *Smith* v. *Hawkins* is directly in conflict with the proposed instruction. The instruction offered was that "the right to the ditch con-" tinues only so long as the ditch is used to convey " water for a needful and beneficial purpose, and " whenever the party who built the ditch, or his " successor in interest, ceases to use the same *for an* " *unreasonable length of time*, for the purpose of convey-" ing water to be used for a needful purpose, then the " rights of the party who built the ditch, or his suc-" cessors in interest, end" The case of *Smith* v. *Hawkins* decides, not that the right was lost by a failure to use for a reasonable or unreasonable time, but that the right was lost by a failure to make any use of it for a period of five years. The decision has fixed a specific time, a definite period. This offered instruction

undertook to leave it to the jury to determine for themselves what the time should be, based wholly upon what the jury should consider a reasonable or unreasonable length of time. The right of the defendant in error depends upon a statute of the State of California. The Supreme Court has construed that statute, and construed it that the right is lost by a failure to use for five years. The instruction asked by the appellant in error, was that the right would be lost by a failure to use for an unreasonable length of time.

The instruction refused, and contained in Specification of Error No. 44, was properly refused. The elements contained in sentence 1 of that instruction were given in the instructions of the Court. The elements contained in the second sentence are in direct conflict with the decision of *Smith* v. *Hawkins*. Under that decision the right to use water does not terminate when the use is discontinued, but does terminate when the use is discontinued for a period of five years, or when the right is abandoned. The element contained in next to the last sentence was not warranted by the evidence in the case. There was no evidence tending to show that the purpose for which the water was originally appropriated, had failed. On the contrary, the evidence showed that there were still vast deposits of ore in the Altoona Quicksilver Mines to be worked and concentrated, but it also showed that the Altoona Company had other uses to which it could put the water, and to which it contemplated putting the water, and to which it would have put the water, had it not been for its protracted litigation, and had not the plaintiff in error interfered with its possession.

It is not out of place in this portion of the argument to call attention to the fact that a number of the specifications in error are based on the proposition that the respondent in error, against objection, was allowed to prove that the mine still contained, and had always been known to contain, vast deposits of paying cinnabar, or quicksilver ore. The correctness of the ruling of the Circuit Court in admitting this evidence is manifest in connection with these specifications of error, viz: that it was the duty of the Court to admit evidence tending to show that the purpose for which the water was appropriated had not been fully accomplished, but that there were still vast deposits of known quicksilver mining ore. left to be worked by the use of this ditch and water right; and to establish this fact beyond a controversy, the quantity and value of the quicksilver ore actually mined, above the level of the tunnel, and the large deposits of the same character that were thereafter still in sight in the bottom of the tunnel, viz: an ore chute of valuable ore, 800 feet in length, and from two to twenty feet in width; that it had been worked out above the level of the tunnel, and that was still visible for that distance in the bottom of the tunnel, during the whole period of time in which plaintiff in error claims that he ought to have had an instruction of the purport that, if the uses for which the water had been appropriated had ceased, etc. The last sentence of this instruction was not applicable to the case at bar. There was no evidence in the case tending to show any act of defendant in error, "upon the prin-
"ciple of the dog in the manger."

We respectfully submit that there is no conflict between the decisions of *Utt* v *Frey*, 106 Cal. 397–398, and *Smith* v. *Hawkins*, 42 Pacific Reporter, p. 453. The one case was upon the doctrine of abandonment, where no cessation of user for a period of five years was shown, as in the case at bar. The other was a case where there had been a cessation of user, not merely for the period of five years, but an absolute non-user of either the ditch or water right for a period of more than thirteen years.

Evidence as to the title of the quicksilver mines of respondent in error was proper evidence to show that the respondent in error had useful purposes to which to apply the water. The decision of *Smith* v. *Hawkins* recites the fact that the plaintiff had leased his ditch and water right for a period of two months at a rental of $15 per month, but emphasized the fact that the lessee had made no use of the ditch and water right, thereby clearly indicating that if the lessee had used the ditch and water right, that, in a proper case, would have been pertinent.

It is with more or less regret that we notice, near the bottom of page 46, and in the middle of page 47, that counsel have taken occasion to intimate that evidence was offered and admitted in this case solely for the purpose of allowing counsel for defendant in error to make an argument that his client, being prodigiously rich, should be awarded a verdict; and that evidence that his client was kept out of possession by threats, was to give an opportunity for eloquence with regard to desperadoes. The former would have been exceedingly foolish,

to say the least, in a trial before a jury, and the latter was for a legitimate purpose, as indicated and urged *supra*. Cases in the Court in which this case was tried are conducted, so far as we have had occasion to observe them, with the greatest decorum, and attorneys are held to unusual strictness in the conduct of cases, in their demeanor, and in the presentation of arguments to juries; and so far as the counsel for respondent in error is concerned, he entirely approves of such conduct at jury trials, and has no disposition to trespass upon such wholesome regulations.

The Judgment Roll.

Under this heading counsel for appellant in error contends that an action of ejectment for the ditch and water right cannot be maintained. We have not contended, nor do we contend, that a judgment in ejectment can be rendered for a water right alone; but it is Hornbook law that the action of ejectment does lie for a corporeal hereditament, and a ditch is a corporeal hereditament It consists of the bottom or bed, and the sides or banks, of the ditch, (which are of the very substance of the earth, and immovable,) and all of the necessary supports to maintain them. A reccovery in ejectment of a corporeal hereditament will be recovery of such corporeal hereditament with its appurtenances; and, in this case, the judgment is for the ditch and its appurtenances. The Supreme Court of California has decided that eject-

ment does lie for a ditch and dam, with its appurtenant water rights. See—

Nevada Co. & Sacramento Canal Co. v. *Kidd et als.*, 37 Cal., pp. 292, 301, 325–7;

Mitchell v. *Canal Co.*, 75 Cal., p. 471.

The case of *Swift* v. *Goodrich*, 70 Cal., pp. 106–7, cited by appellant, was an action brought to enjoin the defendants from using or diverting the waters of a certain stream, and it was an action between two riparian proprietors, and was merely a contention between them as to who had a right to divert water from the stream, and there is nothing in that case holding that a ditch is not a corporeal hereditament, or that ejectment will not lie for it. The other California case cited by counsel for appellant in error, *Tibbetts* v. *Blakewell*, 35 Pac. Rep., p. 1007, was an action of ejectment, in which the ouster was denied. The only evidence of ouster was evidence that defendant had diverted and appropriated the water which the ditch was entitled to take. In such a case, of course, there was no ouster as to the corporeal hereditament.

Counsel for appellant in error, to sustain his contention that ejectment will not lie to recover a ditch, etc., cites three other cases:

1st. *Earl* v. *de Hart*, 72 Am. Dec. 398, from 1 Beardsley's Ch. (N. J.), 280.

This was an action in equity to obtain a mandatory and prohibitory injunction, to prevent and remove obstruction (by an adjoining owner) of a water course which drains the plaintiff's land. The relief was granted on the ground that the relief amounted to the abatement of a nuisance. There is not a word in the case concerning ejectment.

2nd. *Hawley* v. *Shelton*, 33 Am. St. 942, from S. C., 64 Vt. 491:

This was an action to prevent the alleged obstruction of an alleged water course on defendant's land. The jury found there was never any water course on defendant's land. And the Supreme Court sustained the verdict. There is not a word about ejectment in the decision of this case.

3rd. *Chamberlain* v. *Hemingway*, cited as 33 Am. St. 332 (should be 38 Am. St. 332) from S. C., 63 Conn. 1:

This was a suit for an injunction. Plaintiff and defendant owned adjoining lands, the front portion of which was mud flats bordering on salt water. Through these mud flats was a short sluice-way, 300 feet long, back and forth through which the tide ebbed and flowed. At low tide there was no water in the sluice-way. There was no stream of water Defendant, in redeeming these mud flats, partially filled up the sluice-way. Plaintiff brought an action, alleging this sluice-way to be a natural water course, and his rights in the cause turned upon the truth of that allegation. The Courts decided it was not a water course, as it contained no stream of water. There was no question in the case as to the proper form of action, and ejectment is not mentioned in the decision, nor anything relating to the matter of ejectment. The plaintiff claimed "riparian" rights, and the Court decided his rights were "littoral," and not "riparian." But in the case the Court did say: "A water course consists of bed, "banks, and water."

The last case cited in appellant's brief, viz: *Tibbetts* v.

Blakewell, 35 Pac. Rep. 1007, needs no answer, except to call attention to the fact that the case as stated in appellant's brief, was a case where the plaintiff alleged an ouster from a strip of land six feet wide, on which was constructed a ditch. The ouster being duly denied, the only evidence to support the allegation of ouster was that the defendant had diverted the water away from the ditch (at its head) and appropriated it to his own use. It needs no argument to show that these acts did not constitute an ouster of the plaintiff's possession of the ditch.

But in the case at bar, there can be no contention that the respondent in error was not ousted from the possession of the ditch, for the defendant, in its answer, denies the plaintiff's ownership or right of possession of the ditch, and that waives the necessity of any proof of ouster. See —

Salmon v. *Wilson*, 41 Cal., p. 595;
McCrary v. *Everding*, 44 Cal. 284.

Furthermore, in paragraph 8 of defendant's answer (see transcript, near bottom of page 10), the appellant in error "admits that defendant still holds and with-
" holds from the plaintiff the possession of the said Bos-
" ton Ditch and of the water rights connected there-
" with."

We respectfully submit, that there was no error of law in the trial of this case, and that the judgment of the Circuit Court should be affirmed.

C. W. CROSS,
Attorney for Defendant in Error.

No. 280.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING CO.

Plaintiff in Error,

vs.

ALTOONA QUICKSILVER MINING CO.

Defendant in Error.

Petition for Rehearing of Plaintiff in Error.

E. W. McGRAW,
of Counsel for Plaintiff in Error.

Filed June ..... , 1896.

FILED
JUN 27 1896

Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING COMPANY,
Plaintiff in Error,

vs.

ALTOONA QUICKSILVER MINING COMPANY,
Defendant in Error.

PETITION FOR REHEARING OF PLAINTIFF IN ERROR.

To the Honorable, the Court aforesaid;

The plaintiff in error respectfully petitions for a rehearing in the above-entitled case upon the ground of errors in the opinion of the Court heretofore rendered in said case in the following particulars:

1st. Error as to the facts of the case as disclosed by the record.

2nd. Error in law in the opinion.

I.

As to the Errors of Fact.

From the opinion of the Court we extract as follows: "Upon a careful inspection of the testimony which is presented in the bill of exceptions, concerning the question of the abandonment of the water right by the defendant in error, we are unable to find that any witness testified to a continuous non-user of the ditch for a period of five years before the plaintiff in error took possession. There are several witnessess upon the subject and their testimony is more or less vague, and some of them testify to a non-user of a portion of the ditch at different periods, and in one instance for as long a period as ten years. Yet there is no witness who testifies that the whole of the ditch was unused by the defendant in error or by its tenants or lessees at any time continuously for five years."

We think there must have been some inadvertence of expression in the opinion as written above. Literally as it is written, it means that a party to an action cannot succeed unless he proves the whole of his case by one witness. We presume the Court meant to say that there was no testimony tending to prove the non-user of the ditch in question by the plaintiff for five years. But even as literally read the opinion is incorrect as to the facts. We did in fact prove by one witness the non-user of the whole ditch by plaintiff not only for five but for fourteen years prior to the entry of defendant in 1892, and for over fifteen years before this action was commenced in December, 1893.

Chas. Allenberg, plaintiff's witness, and the manager and superintendent of plaintiff, testified (Transcript p. 100)

" that all he ever did in relation to the Boston ditch " since 1878 was simply to claim it and think that at some " time he would use it for power."

The same witness emphasizes that testimony in the same page of the transcript wherein he explains as follows:

" That, when witness stated in his direct examination " that they had not previously used the water for water " power to run their machinery by water power, because " they had not been able to use the lower end of the Bos- " ton ditch, which would give them sufficient power to get " water power to move their machinery; what he meant " was, that inasmuch as the Integral Company had de- " prived them of Boston ditch, they could not certainly " make use of the lower end of the Boston ditch, that " is from the Integral mine down to the Altoona mine. " That the Integral Company, taking away the Boston " ditch from us, and not being able to get the water " through the Boston ditch, they could not get the water " from the head of the ditch down to the Altoona mine " for the purpose of getting water to run their machinery " with. The Integral works are near the Boston ditch, " between the head of the ditch and the Altoona Com- " pany's mines, *and when the Integral Company takes* " *the water, and uses it, from the Boston ditch, it does* " *not run through the lower part of the Boston ditch,* " *and the Altoona Company cannot get it.*"

In the complaint the ouster of the Integral Company is alleged to have been in August, 1893. (Trans. p. 3.)

The Integral Company first used the Boston ditch in July, 1892. (Testimony of McCaw, p. 106.) There

is no conflict in the testimony on that point. So, taking Allenberg's testimony as a whole, it means that his company, the plaintiff, made no use of the Boston ditch from 1878 to 1892, and after 1892 were prevented from using it by defendant.

Thus we have the direct testimony of the plaintiff itself—through its manager—that for fourteen years after 1878. it made no use of the Boston ditch.

There is abundance of other testimony tending to show a non-user for over five years. In fact as to use by the *plaintiff* of the ditch, the testimony is all one way—what little conflict there is in the testimony is as to use of the ditch by others than the plaintiff.

The question raised by this Court as to want of testimony of non-user of the *whole* ditch is a question raised by the Court and not by counsel for respondent.

If such a point properly existed in the case, it is quite certain that the able counsel for respondent would have discovered it. In fact, there is no such question properly in the case. There is abundant evidence of non-user at and below the Boston mine for over five years. There was never any claim at the trial that there was any place above the Boston mine where the water of the ditch could be used. All the evidence of user there was on either side was directed to user at and below the Boston mine. If the Court will look at the map, Exhibit 2, it will see that there is no mining claim above the Boston mine on the ditch. The only evidence there is in the case of the use of water from the Boston ditch by any one is:

1st. Its use at Boston mine by Boston Mining Com-

pany in 1876; by the plaintiff in 1878; by Butler from 1886 to 1889; and by defendant since 1892.

2d. Its use at Dolilffe mine by Butler in 1886–7. (The Dolliffe mine is the next mine below the Boston mine on the Boston ditch.)

3d. Its use by plaintiff on the Altoona and Trinity claims about 1876.

4th. Its use on the Loring claim by Loring. The dates of the user on that mine are the only dates as to which there is a conflict of evidence. Our evidence tends to show its latest use was in 1880. (The Loring claim adjoined the Trinity and Altoona on the west.)

The only place where plaintiff could possibly use water from the Boston ditch was at the lower end of the ditch, and, with one exception, there is no testimony whatever of any use by plaintiff except at that place. That exception is in Allenberg's testimony, who testifies (p. 85) that in 1878 the plaintiff used water from the Boston ditch in the Boston mine; but he also testifies (p. 78–9) that since 1878 the plaintiff had nothing to do with the Boston mine. So that testimony as to non-user of the lower end of the ditch by plaintiff is testimony tending to prove the non-user of any portion of the ditch. This use of the water in 1878 is the last use by the Altoona Company of the Boston ditch of which there is any testimony.

Their witness Littlefield says he does not think Boston ditch was used in 1879 (p. 37).

Girard, who was in employ of plaintiff from 1880 to 1888, and was at the mines from 1879 to 1894, says (p. 73): That the only year during that time when any

water ran through the Boston ditch down to the Altoona mine was in 1880, when it was used in the Loring claim. That during the whole time witness was there no water was ever used from the Boston ditch for mining in the Altoona or Trinity claims (pp. 76–7).

M. D. Butler, who was there from and after 1882, says from 1882 to 1886, there was no water in Boston ditch except that used by witness in Boston mine. That witness used the water in the Boston mine in 1886, 7, 8, and in portion of 1889 (p. 51). That from 1886 to 1892 the Altoona Company used no water from the Boston ditch for their own benefit (p. 52). Also, that when witness cleaned out and repaired the ditch in 1886 it had not been used for a great many years.

Cummings, who was there from the time the mines were discovered till 1881, and afterwards from 1886 to 1891, says during that period he saw water in Boston ditch below Boston mine on only one occasion—he don't recollect the year; that from 1886 to 1891 there was no water in the ditch below the Boston mine.

We submit that the above evidence amply tends to prove that the plaintiff in this case made no use of the Boston ditch from 1878 to the commencement of this action in 1893—a period of fifteen years; and that from 1880 to 1886, a period of six years, no use was made of it by any person under permission from plaintiff or otherwise, and that the opinion of this Court was based on an erroneous supposition as to the facts.

It was easy for the Court to be misled, as two ditches figure in the testimony: the Altoona or lower ditch and the Boston or upper ditch, the latter of which is the only

one in controversy. As to the lower or Altoona ditch it is a fact that the testimony does not show a cessation of use by plaintiff below for five years, and we doubt not that the Court has been misled by testimony which related only to the Altoona ditch.

II.

As to Errors of Law.

This case depends upon the construction and meaning of Section 1411 of the Civil Code of California, which was for the first and only time construed by the Supreme Court of California in the case of

Smith *v.* Hawkins, 42 Pac. Rep., 453,

not yet officially reported.

Using the language of the Supreme Court of the United States:

" The construction given to a statute of a State by the " highest judicial tribunal of such State is regarded as a " part of the statute, and is as binding upon the Courts " of the United States as the text."

Leffingwell *v.* Warner, 2 Black, 603.

In Smith *v.* Hawkins is the only construction of Sec. 1411 of the Civil Code of California. The previous case of Utt *v.* Fry was apparently decided by the Court in ignorance of the provisions of said Section 1411. Said Section 1411 is not discussed in the opinion, and apparently it was not brought to the attention of the Court. But even if it be considered as a construction of Section 1411 (which it was not), still the later construction in Smith *v.* Hawkins must govern.

In Leffingwell *v.* Warren (*supra*), the Supreme Court of the United States says:

"If the highest tribunal of a State adopt new views as "to the proper construction of such a statute, and re- "verse its former decisions, this Court will follow the "latest settled adjudications."

It is held in

Moores *v.* Cit. Nat. Bank, 104 U. S., 625,

that the construction given to a State statute by the Supreme Court of a State will be followed by the Supreme Court, in a case decided the other way by the Circuit Court before the decision of the State Court.

And the Supreme Court will overrule its own decisions as to construction of a State statute, where there is a subsequent decision of the State Court giving a different construction.

Green *v.* Neal, 6 Peters, 291.

Or when, at the time of rendering such decision, there was an existing decision of the State Court giving a different construction, of which the Supreme Court had not been informed.

Fairfield *v.* County of Gallatin, 100 U. S., 47.

So the doctrine of Smith *v.* Hawkins is necessarily the law of this case.

That case holds that a continuous non-user for five years, without or with an intent to abandon, will forfeit the right to a water ditch. When, therefore, the Court below charged the jury that "the mere intention to abandon, if not coupled with yielding up possession or cessation of user, is not sufficient, *nor will the non-user alone, without an intent to abandon, be held to amount* to an abandonment," it announced a doctrine which,

under no conceivable circumstances, could be correct, as applied to the title to a water ditch, a doctrine which, in this case, must have misled the jury, and which took from them the right to pass upon the question of continuous non-user for five years.

And when it charged the jury that "use of the ditch and water by any other person, by permission of the owner, is sufficient to maintain the owner's possession, as though it were used by the owner," it announced a doctrine at variance with that of Smith *v.* Hawkins, and therefore erroneous.

And when the Court refused to instruct, at our request, that non-use of the water by plaintiff since 1881 (this suit being commenced in 1893) was a forfeiture of any right to the ditch that the plaintiff previously had, it refused an instruction which was good law, and applicable to the case at bar under the doctrine of Smith *v.* Hawkins.

For these manifest errors the judgment should be reversed.

It is well settled that it is error in a Court to refuse to give an instruction which contains a correct statement of the law and is strictly applicable to the case.

Thorewegan *v.* King, 111 U. S., 549.
Douglas *v.* McAllister, 3 Cranch, 298.

Also that it is the right of each party to have an instruction on his theory of the case, if there be *any* evidence to support that theory, and that it is error for the Court to give an instruction which makes the case turn on one point only, when there are other grounds which should be passed on by the jury.

Adams *v.* Roberts, 2 Howard (U. S.), 486.
Ranney *v.* Barlow, 112 U. S., 207.
Fiore *v.* Ladd (Oregon), 36 Pac. Rep., 572.
Renton, Holmes & Co. *v.* Monnier, 77 Cal., 455.
N. Y. P. & N. R. Co. *v.* Thomas (Va.), 24 S. E. Rep., 264–5.
Eastman *v.* Curtis (Vt.), 32 Atl. Rep, 234-5.
Chicago H. L. Ass'n *v.* Butler, 55 Ill. App., 462.
Anderson *v.* Bath, 42 Maine, 346.
Sawyer *v.* Hannibal, etc., R. R. Co., 37 Mo., 240.
White *v.* Thomas, 12 Ohio St., 312.
Adams *v.* Capron & Co., 21 Maryland, 186.
Zabriskie *v.* Smith, 13 N. Y., 322.

The giving of an incorrect or inapplicable instruction, or the refusal to give a correct and applicable instruction, is reversible error, unless it affirmatively appears from the record that no damage could have resulted.

Beaver *v.* Taylor, 1 Wallace, 637–644.
Etting *v.* Bank of United States, 11 Wheat, 95.
Adams *v.* Capron, 21 Md., 186.
S. C., 83 Am. Dec., 571.
Busenius *v.* Coffee, 14 Cal., 93.
Richardson *v.* McNulty, 24 Cal., 346.
McDougal *v.* Cent. R. R. Co., 63 Cal., 434.
People *v.* Devine, 95 Cal., 231.

"We concede that it is a sound principle that no judg-
"ment should be reversed in a Court of Error when the
"error complained of works no injury to the party against
"whom the ruling was made. *But whenever the appli-*
"*cation of this rule is sought it must appear so clear as*

" *to be beyond doubt, that the error did not, and could not,*
" *have prejudiced the party's rights.*"

Deery *v.* Cray, 5 Wallace, 795–807.

" We repeat the doctrine of this Court laid down in " Deery *v.* Cray, that while it is a sound principle that no " judgment should be reversed on error when the error " complained of worked no injury to the party against " whom the ruling was made, it must be so clear as to be " beyond doubt that the error did not and could not have " prejudiced the right of the party. The case must be " such that this Court is not called on to decide upon the " preponderance of evidence, that the verdict was right, " notwithstanding the error complained of."

Smiths *v.* Shoemaker, 17 Wallace, 630–639.
Gilmer *v.* Higley, 119 U. S., 99–103.
Boston and Albany R. R *v.* O'Reilly, 158 U. S., 335–6.

" But it was said by the Supreme Court of Montana, " on appeal, that since the record did not contain all the " testimony, the Court could not see that the defendants " were injured by the refusal to have the questions an- " swered.

" We have not before heard of such a rule in a revisory " Court. *The furthest any Court has gone has been to* " *hold that when such Court can see affirmatively that* " *the error worked no injury to the party appealing, it* " *will be disregarded.*"

Gilmer *v.* Higley, 110 U. S., 47–50.

We call the attention of the Court to the fact that in

this case the record does not purport to contain all the testimony, and that it is impossible for the Court to see affirmatively that no injury was done by the errors complained of.

A very late decision of the Circuit Court of Appeals of the 8th Circuit is also very much in point.

> Nat. Mass. Acc. Assn. *v.* Shryock, 73 Fed., 774–781.

As we have shown, there was evidence in the case tending strongly to show a non-user of the ditch by *any one* from 1880 to 1886, a period of more than five years, and a non-user by plaintiff from 1878 to 1893. We submit most respectfully that it was our right to have the jury pass upon that question of non-user, and that the question was certainly taken away from the jury by the Court below. This Court, in its opinion, speaks of user by tenants and lessees of plaintiff. We think the question of tenants and lessees of plaintiff unimportant, as our testimony tended to prove a non-user by *any one* for over five years, but we call the attention of the Court to the fact that the Supreme Court of California in Smith *v.* Hawkins held that a person could not prevent the loss of right from non-user by leasing the same and allowing other persons to use it. In this case as to one of the alleged tenants, Butler, the license he received was not binding on him. He entered on the ditch in 1886, at which time it had been used by no one for over five years and consequently was owned by no one. At some indefinite time after 1886 he accepted a license from plaintiff

to use it, but as he did not enter under the license, he could on familiar principles contest the title of plaintiff.

Davis *v.* McGrew, 82 Cal., 135.

Davidson *v.* Ellmaker, 84 Cal,, 21.

It is manifest that if plaintiff had forfeited its right to the ditch by non-user, it could acquire no new title by leasing the ditch, and that a lease which as against its tenant would not be evidence of title, could have no weight as against third parties.

III.

This Court ignores our exceptions to the admission of evidence. The exceptions were taken and argued in good faith, and we believe them well founded.

Since this case was submitted we have noticed a decision of the Supreme Court of the United States which has a direct bearing upon one exception to the admission of testimony.

Our Assignment of Error XXXVI (Brief p. 24) is as to the overruling by the Court of our objection to the following question asked by plaintiff of the witness Allenberg.

"What amount of money was expended by the "Altoona Quicksilver Mining Co. in the operation and "development of its properties in the Cinnabar Mining "District in Trinity County, California, from the time the "company took possession of the property up to the "commencement of this suit?"

Objected to by defendant as immaterial, irrelevant and incompetent. Objection was overruled by the Court. (Transcript, pp. 96, 97.) To which ruling counsel for

defendant then and there duly excepted. Answer of witness: "About $257,000."

We insisted on this assignment in our argument. (Brief p. 50.)

On December 23rd, 1895, the Supreme Court decided an ejectment suit for a mining claim and in the opinion the Court says:

"Lastly it is contended that the District Court erred "in permitting the plaintiff to prove that it had expended "between $7,000 and $8,000 in working the mines from "the time it took possession until it was ousted there- "from by the defendant Haws. This testimony was "offered to show good faith in working the property by "the plaintiff company. We think it was competent *in* "*view of the requirements of the U. S. Rev. Stat.*, "§2325, *that on each claim located after May* 10, 1872, "*and until a patent has been issued therefor, no less than* "$100 *worth of labor shall be performed, or improve-* "*ments made during each year.*"

Haws *v.* Victoria Copper Mining Co., Advance Opinions Lawyers Co-Op. Pub. Co., Jan. 15, 1896. No. 5, p. 316, 321.

This opinion cannot be otherwise construed than as holding that, except for the statute aforesaid, the evidence would have been inadmissible.

In the present case the question is embarrassed by no such statute. The thing in controversy was a water ditch which had not been used in connection with the mining properties inquired about, since 1876, over 17 years before suit was brought.

We again respectfully submit that the admission of the testimony was error, and that the Supreme Court in effect so decides.

We ask the Court to examine our brief as to other questions of evidence discussed.

Respectfully submitted,

E. W. McGRAW

Counsel for Plaintiff in Error.

UNITED STATES OF AMERICA,
Northern District of California, } ss.

I, E. W. McGraw, counsel for the plaintiff in error in the above-entitled case, do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded in fact and in law, and that the same is not interposed for delay.

San Francisco, June 26, 1896.

E. W. McGraw

No. 281.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PACIFIC COAST STEAMSHIP COMPANY, a corporation,
Appellant,
vs.
EBEN W. FERGUSON, ELIDA F. HOBSON, and JOHN COOK, co-partners, and doing business under the firm-name and style of Moore, Ferguson & Co.,
Appellees.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Northern District of California.

INDEX.

Citation on Appeal.

UNITED STATES OF AMERICA—ss.

THE PRESIDENT OF THE UNITED STATES, to Eben W. Ferguson, Elida F. Hobson, and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 3rd day of February next, pursuant to an order allowing appeal entered in the Clerk's office of the District Court of the United States for the Northern District of California in that certain cause entitled Pacific Coast Steamship Co., a corporation, libelant, vs. Eben W. Ferguson, Elida F. Hobson, and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., respondents, and you are admonished to show cause, if any there be, why the judgment rendered against the said libelant as in the said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WM. W. MORROW, Judge of the United States District Court for the Northern District of California, this 24th day of January, A. D. 1896.

WM. W. MORROW,

Judge.

[Endorsed]: Filed Jan'y 24th, 1896. Southard Hoffman, Clerk.

Service of the within Citation is hereby admitted this 24th day of January, 1896.

MASTICK, BELCHER & MASTICK,
Attorneys for Respondents.

In the District Court of the United States, in and for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY, a Corporation,
Libelant,
vs.
EBEN W. FERGUSON, ELIDA F. HOBSON, and JOHN COOK, Copartners, and doing business under the firm name and style of Moore, Ferguson & Co.,
Respondents.

Libel.

To the Honorable WM. W. MORROW, Judge of the District Court of the United States of America, for the northern district of California:

The libel of the Pacific Coast Steamship Company, owners of the steamer "Bonita," in a cause of contract, civil and maritime, respectfully shows and alleges:

I.

That libelant is, and during all the times herein refer-

red to was, a corporation organized and existing under and by virtue of the laws of the State of California, with its office at the city and county of San Francisco, said state.

II.

That respondents above named are, and during all the times herein referred to were merchants, and copartners doing business at the said city and county of San Francisco, under the firm name and style of Moore, Ferguson & Co. and residing at said city and county.

III.

That at and during all the times herein referred to, libelant was the owner of, and was in control of, that certain steam vessel named "Bonita," and that heretofore, to wit, on the 2nd day of November, 1894, said Moore, Ferguson & Co., shipped on board of said steamer "Bonita," at Moss Landing, to be from said landing transported and delivered to the Howard Commercial Co., at the port of San Diego, all in the State of California, certain merchandise, to wit, 2,448 sacks of barley, marked "96," and weighing 271,510 pounds; and said Moore, Ferguson & Co. then and there agreed, in consideration, that the same was so shipped and should be so transported and delivered; to pay to libelant the sum of $4.35 per ton of 2,000 pounds for each and every such ton of the same so shipped and so transported and delivered. That at the time aforesaid, to wit, the time said Moore, Ferguson & Co. so shipped such barley, it was agreed by and between said Moore, Ferguson & Co. and libelant, at the special instance and request of said

Moore, Ferguson & Co., that such barley should be delivered to the Howard Commercial Co. at said San Diego, upon the payment by said Howard Commercial Co. to libelant, upon such delivery, of the sum of $2.50 per ton of 2,000 pounds for each and every such ton that should be so delivered, which sum of $2.50 per ton so to be paid should be credited as a payment, on account, toward the payment of said sum of $4.35 per ton agreed to be paid by said Moore, Ferguson & Co., as above stated, the balance of such sum of $4.35 per ton, to wit, the sum of $2.10 per ton of 2,000 pounds said Moore, Ferguson & Co. promised and agreed, such delivery of said barley being first made, to pay on demand to libelant.

IV.

That thereupon, and thereafter, said barley, and all thereof, was transported on said steamer, and on, to wit: the 6th day of March, 1884, was delivered in good order and condition, to said Howard Commercial Co., at said San Diego, in full compliance with the agreement above stated, and there was paid to libelant upon such delivery by said Howard Commercial Co., and the same was accepted by libelant pursuant to the agreement with said Moore, Ferguson & Co., the sum of, to wit: $339.38, being the sum of $2.50 per ton, for each and every ton of 2000 pounds of such barley so shipped and so delivered.

V.

That thereafter, and heretofore, to wit: on the day of November, 1894, the said Moore, Ferguson & Co., were fully informed by libelant of the facts aforesaid, to wit:

of such delivery and payment, as aforesaid, and the demand was thereupon made upon said Moore, Ferguson & Co., by libelant; that said Moore, Ferguson & Co., pay to libelant the balance of said sum of $4.35 per ton, agreed to be paid to libelant by said Moore, Ferguson & Co., as aforesaid, to wit: the full sum of $251.15, which sum and every part thereof, said Moore, Ferguson & Co., then did, and ever since, though often requested so to do, have neglected, declined and refused to pay to libelant; and there is now due to libelant as freight upon such barley, so shipped, the sum of $251.15, together with interest on said sum from the said 6th day of November, 1894.

VI.

That by reason of the premises, libelant has been damaged in the full sum of two hundred fifty-one and $\frac{15}{100}$ ($251.15) dollars, and interest as aforesaid.

VII.

That all and singular the premises are true and within the admiralty, and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelant prays that a citation in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said Moore, Ferguson & Co., and that they be cited to appear and answer upon oath, all and singular, the matters aforesaid, and that this Honorable Court will be pleased to decree payment of the freight aforesaid, with interest and costs, and that libelant may have such other and further relief in the

premises as in law and justice they may be entitled to receive.

PACIFIC COAST STEAMSHIP COMPANY.

(By CHAS. GOODALL, President.)

GEO. W. TOWLE, Jr.,

Proctor for Libelant.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Charles Goodall, being first duly sworn, deposes and says: That he is the President of the Pacific Coast Steamship Company, a corporation, libelant, in the above-entitled proceeding, and that as such President, he is authorized to make, and does make, the above and foregoing libel, and verify the same for and on behalf of said company, libelant; that he has read the foregoing libel, and knows the contents thereof, and that the same is true of his own knowledge, excepting as to matters therein alleged upon information or belief, and as to such matters that he believes the same to be true.

CHAS. GOODALL.

Subscribed and sworn to before me this 22nd day of May, 1895.

[SEAL] JAMES L. KING,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 23rd, 1895. Southard Hoffman, Clerk.

Citation to Appear in District Court.

NORTHERN DISTRICT OF CALIFORNIA—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To the Marshal of the United States for the Northern District of California, Greeting:

Whereas, a libel has been filed in the District Court of the United States for the Northern District of California on the 23d day of May in the year of our Lord one thousand eight hundred and ninety-five, by Pacific Coast Steamship Company, a corporation, against Eben W. Ferguson, Elida F. Hobson and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., in a certain action of contract, civil and maritime, to recover the sum of $251.15 (as by said libel, reference being made thereto, will more fully and at large appear), together with interest on said sum from the 6th day of November, 1894, therein alleged to be due the said libelant, and praying that a citation may issue against the said respondents, pursuant to the rules and practice of this court. Now, therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondents if they shall be found in your district, that they be and appear before the said District Court, on Tuesday, the 4th day of June, A. D. 1895, at the courtroom in the city of San Francisco, then and there to answer the said libel, and to make their allegations in that behalf, and have you then and there this writ, with your return thereon.

Witness, the Honorable WILLIAM W. MORROW, Judge of said court, the 23d day of May in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the one hundred and nineteenth.

[SEAL.] SOUTHARD HOFFMAN,
Clerk.

GEO. W. TOWLE, Jr. Esq.,

Deputy Clerk.

Marshal's Return.

I have served this writ personally by copy on Eben W. Ferguson, Elida Hobson and John Cook, doing business under the firm name and style of Moore, Ferguson & Co., this 23d day of May, A. D. 1895.

BARRY BALDWIN,
U. S. Marshal.

By J. A. Littlefield,
Deputy Marshal.

[Endorsed]: Citation issued May 23d, 1895. Citation ret'ble June 4th, 1895. Geo. W. Towle, Jr., Proctor for Libelant. Filed June 4th, 1895. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

Order of Proclamation, Etc.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the city of San Francisco, on Tuesday, the 4th day of June, in

the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Wm. W. Morrow, Judge.

Pacific Coast Steamship Company,
vs.
E. W. Ferguson, et al. } No. 11,167.

The United States Marshal having returned upon the citation in this cause that he has served the citation on respondents herein, on motion of Geo. W. Towle, Jr., Esq., proctor for the libelant, proclamation was duly made, and on motion of W. C. Belcher, Esq., proctor for the respondents, it is ordered that the respondents have ten days to answer.

Respondent's Stipulation for Costs.

No. 11,167.

United States of America.

District Court of the United States, for the Northern District of California.

Whereas, a libel was filed in this court on the 23rd day of May in the year of our Lord one thousand eight hundred and ninety-five by Pacific Coast S. S. Co., against E. W. Ferguson et al., for reasons and causes in the said libel mentioned and the said E. W. Ferguson et al., and

A. O. Mulligan his sureties, hereby consenting and agreeing that in case of default or contumacy on the part of the said Respdts., or his sureties, execution may issue against their goods, chattels, and lands for the sum of five hundred dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of five hundred dollars conditioned the Respondents, abovenamed shall pay all costs and charges that may be awarded against them in any decree by this court, or, in case of appeal by the Appellate Court.

MOORE, FERGUSON & Co.,
per E. M. FERGUSON.
A. O. MULLIGAN.

Taken and acknowledged this 4th day of June, 1895, before me.

J. S. MANLEY,
Commissioner United States Circuit Court, Northern District of California.

NORTHERN DISTRICT OF CALIFORNIA—ss.

A. O. Mulligan, parties to the above stipulation being duly sworn, do depose and say, each for himself that he is worth the sum of five hundred dollars, over and above all his debts and liabilities.

A. O. MULLIGAN.

Sworn to this 4th day of June, 1895, before me,

J. S. MANLEY,
Commissioner United States Circuit Court, Northern District of California.

[Endorsed]: Filed the 4th day of June, 1895. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, for the Northern District of California.

Pacific Coast Steamship Company, a Corporation, Libelant, vs. Eben W. Ferguson, Elida F. Hobson and John Cook, Copartners, and doing business under the firm name and style of Moore, Ferguson & Co., Respondents.	No. 11,167. In Admiralty.

Answer.

To the Hon. William W. Morrow, Judge of the District Court of the United States of America for the Northern District of California:

Eben W. Ferguson, Elida F. Hobson and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., of San Francisco, in the Northern District of California, for answer to the libel of the Pacific Coast Steamship Company, a corporation, in a cause of contract, civil and maritime, do allege and propound as follows:

1. They admit the allegations of the first article of said libel.

2. They admit the allegations of the second article of said libel.

3. They admit that, at and during all the times referred to in said libel, libelant was the owner of and was in control of that certain steam vessel named "Bonita" and that, on the second day of November, 1894 these respondents shipped on board the said steamer "Bonita" at Moss landing, to be from said landing transported and delivered to the Howard Commercial Co., at the port of San Diego, all in the State of California, certain merchandise, to wit: 2448 sacks of barley, marked "96," and weighing 271,510 pounds.

These respondents deny that, at the time and place mentioned in the third article of said libel, or at any time or place, or ever, or at all, these respondents, or any of them, agreed, either in consideration that the said merchandise should be so shipped, transported and delivered, or otherwise, or at all, to pay to libelant the sum of $4.35 per ton of 2,000 pounds for each or any such ton of the same to be shipped, or transported, or delivered, or any sum exceeding $3.35 per ton of 2,000 pounds.

And in that behalf these respondents allege and propound that the agreement between libelant and respondents concerning the shipping and transportation of said merchandise was as follows, and not otherwise: Libelant agreed that it would transport from said Moss Landing to said San Diego, and would there deliver to the said Howard Commercial Co., the merchandise aforesaid, and, in consideration that the same was so shipped and should be so transported and delivered, these respondents agreed to pay to libelant the sum of $3.10 per ton

of 2,000 pounds, and no other or greater sum, as freight for the transportation of each and every such ton so transported and delivered, as aforesaid, and that they would also pay to said libelant such storage charges on said merchandise as had theretofore accrued at the warehouse of libelant, at Moss Landing aforesaid, which warehouse charges, as these respondents are informed and believe to be true, were the sum of twenty-five cents per ton of 2,000 pounds, and no other or greater sum.

These respondents admit that at the time aforesaid it was agreed by and between respondents and libelant, at the special instance and request of respondents, that said merchandise should be delivered to said Howard Commercial Co. at said San Diego upon the payment by said Howard Commercial Co. to libelant, upon such delivery, of the sum of $2.50 per ton of 2,000 pounds for each and every such ton that should be so delivered, which sum of $2.50 per ton so to be paid should be credited as a payment on account toward the payment of the sum agreed to be paid by respondents as herein in this answer alleged; but they deny that they agreed to pay for the same the sum of $4.35 per ton, or any greater sum than $3.35 per ton, as herein above alleged, or that they ever promised or agreed to pay to libelant, as a balance over and above said sum of $2.50 per ton, the sum of $2.10 per ton of 2,000 pounds, or any sum or amount exceeding eighty-five cents per ton of 2,000 pounds.

Further answering, these respondents deny each and every allegation contained in the third article of said libel not hereinbefore specifically admitted.

4. They admit the allegations contained in the fourth article of said libel.

5. They admit that on the 16th day of November, 1894, they were informed by libelant of the delivery of said merchandise, and of the payment made by the said Howard Commercial Co., as alleged in the fourth article of said libel, and that libelant thereupon demanded of respondents that respondents pay to libelant the sum of $251.15 as a balance upon said contract over and above the said sum of $2.50 per ton so paid by said Howard Commercial Co., and that respondents then and there refused and ever since have neglected, declined and refused to pay to libelant the said sum of $251.15, or any greater sum or amount than $115.39; but they deny that there is due or ever was due to libelant, as freight upon said merchandise, the sum of $251.15, with or without interest, or any greater sum or amount than $81.45, or that there is or ever was due to libelant from respondents, under the contract aforesaid, any greater sum or amount than $115.39.

6. They deny that, by reason of the premises, or of any matter or thing in said libel alleged or propounded, libelant has been damaged in the sum of $251.15, with or without interest, or in any sum or amount, or at all.

7. Further answering, these repondents propound and allege, that on the 16th day of November, 1894, and upon demand being made upon them by libelant, as aforesaid, these respondents offered to pay, and tendered to libelant in full payment and satisfaction of the demand aforesaid, the sum of $115.39, being the whole amount due from them to libelant, as aforesaid, and have ever

since that time been ready, able and willing to pay to libelant the said sum of $115.39; but libelant then and there refused, and ever since has neglected and refused to receive or accept the said sum of $115.39, or any part thereof; and these respondents now bring the said sum of $115.39 into court, and do now deposit the same in the registry of this Honorable Court for libelant, in full satisfaction of the obligation aforesaid.

8. That all and singular the premises are true.

Wherefore, these respondents pray that the said libel may be dismissed with costs.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

UNITED STATES OF AMERICA, }
Northern District of California. } ss.

Eben W. Ferguson, being first duly sworn, deposes and says, that he is one of the respondents in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that, as to such matters, he believes it to be true.

EBEN W. FERGUSON.

Subscribed and sworn to before me, this 4th day of June, 1895.

JOHN FOUGA,
Commissioner U. S. Circuit Court, Northern District of California.

[Endorsed]: Filed June 4th, 1895. Southard Hoffman, Clerk.

District Court of the United States, Northern District of California.

PACIFIC COAST S. S. Co., vs. E. W. FERGUSON ET AL. } No. 11,167.

Clerk's Costs and U. S. Marshal's Costs.

1895.

June.	To amt. tender	$115 39
	Clerk's and Commissioner's costs	17 80
	U. S. Marshal's costs	2 00
		$135 19

Rec'd above amt's,

JOHN FOUGA, for Clerk.

June 4, 1895.

[Endorsed]: Filed June 4, 1895. Southard Hoffman, Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the city of San Francisco, on Thursday, the 29th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable WM. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP COMPANY, vs. EBEN W. FERGUSON, ET AL. } No. 11,167.

Hearing,

This cause this day came on regularly for hearing, Geo. W. Towle, Jr., Esq., appearing as proctor for the libelant, and W. B. Treadwell, Esq., as proctor for the respondents. Mr. Towle stated the case on behalf of the libelant and called J. H. Cooper, H. W. Goodall, and Edwin Goodall, who were duly sworn and examined as witnesses on behalf of the libelant and rested.

Mr. Treadwell stated the case on behalf of the respondents and called Eben W. Ferguson, who was duly sworn and examined as a witness on behalf of the respondents, and pending the examination of Mr. Ferguson the further hearing hereof was continued until Friday, August 30th, 1895.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the City of San Francisco, on Friday, the 30th day of August, in the year of our Lord, one thousand eight hundred and ninety-five.

Present: The Honorable Wm. W. Morrow, Judge.

Pacific Coast Steamship Company,
vs.
Eben W. Ferguson, et al. } No. 11,167.

Hearing—(Continued.)

This cause this day came on for further hearing, Geo. W. Towle, Jr., Esq., appearing as proctor for the libellant,

and W. B. Treadwell, Esq., as proctor for the respondents. The examination of Eben W. Ferguson, a witness on behalf of the respondents was resumed and concluded, and Mr. Treadwell called L. H. Garrigus and John Cook who were duly sworn and examined as a witness on behalf of the respondents and rested.

Mr. Towle recalled J. H. Cooper, who was further examined as a witness on behalf of the libelant in rebuttal, and rested.

And, thereupon, the hearing hereof was continued until September 5th, 1895, for argument.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the city of San Francisco, on Tuesday, the 10th day of September, in the year of our Lord, one thousand eight hundred and ninety-five.

Present: The Honorable Wm. W. Morrow, Judge.

Pacific Coast Steamship Company,
vs.
E. W. Ferguson, et al., } No. 11,167.

Hearing—(Continued.)

This cause, this day, came on regularly for argument and was duly argued by Geo. W. Towle, Jr., Esq., proctor for libelant, and by W. B. Treadwell, Esq., proctor for respondents, and submitted to the Court for consideration and decision.

In the District Court of the United States, in and for the Northern District of California.

Hon. W. W. Morrow, Judge.

Pacific Coast Steamship Company (a Corporation),
Libelant,
vs.
Eben W. Ferguson et al.,
Defendants.

Testimony.

Thursday, August 29, 1895.

Appearances: George W. Towle, Esq., appeared as proctor for the libelant; W. B. Treadwell, Esq., appeared as proctor for the respondents.

This libel now came on for hearing in its regular order upon the calendar, and the following proceedings were had:

Mr. Towle. May it please the Court: This is an action by the Pacific Coast Steamship Company against Eben W. Ferguson, et al., a partnership doing business in this city and county, to recover a balance of a sum alleged to be due for freight on certain barley transported from Moss Landing to San Diego in November last—the agreement being at the time the barley was transported that a portion only of the amount of freight due on it should be collected on delivery at San Diego by the Howard Commercial Company, that being the special instance and request of the shippers, who were Moore,

Ferguson & Co., they agreeing at that time that the balance due should be paid by them here on demand after delivery.

The barley was delivered and shipped pursuant to that understanding, delivered in good order at San Diego, and the $2.50 collected there from the Howard Commercial Company, whereupon demand was made upon Moore, Ferguson & Co., here for the balance of the sum due on the shipment, and on their demand being made, payment was refused: hence this suit.

The main subject of controversy in the case arises out of a difference of opinion between the gentlemen on the two sides. On our side, it is alleged, that at the very time this agreement was made, it was expressly called to the attention of Moore, Ferguson & Co., that there might be railroad charges on this lot of barley which would be required to be paid, also—back charges on the barley, when it came into the warehouse of the Pacific Coast Steamship Company at Moss Landing.

The Court. Where was the barley shipped from?

Mr. Towle. From Moss Landing, down the coast.

The Court. Originally shipped from some place in the interior to Moss Landing?

Mr. Towle. It had been shipped by rail. At the time this conversation with reference to this shipment took place, the Pacific Coast Steamship Company, was not informed as to what the particular lot of barley was, or what its condition was as it lay in the warehouse, with reference to railroad charges being a lien on it. In that state of the case they were unable to state definitely what those charges might be, if there were such,

but that matter was expressly called to the attention of the representatives of Moore, Ferguson & Co. They were expressly informed there might be such charges on this barley as the result of railroad transportation from some point to the warehouse at Moss Landing They were asked then whether, in view of that contingency, they would wish this freight to go forward to be delivered to Moore, Ferguson & Co.—they assumed the responsibility for these back charges. They expressly said that they did. In response to their request, the grain was shipped. The agents at San Diego were instructed to deliver on the receipt of $2.50, and the subsequent proceedings took place. The fact was, that there were back charges of $1 per ton—railroad charges on this grain. It is over that question of that $1 per ton, whether Moore, Ferguson & Co. agreed to pay it. that the controversy turns.

The Steamship Company, on delivery, collected the $2.50 and applied that towards the payment of the back charges so far as it was necessary to be applied in that way, and sue here for the balance of freight due.

The allegation as to the incorporation of the plaintiff is admitted. It is admitted that the respondents were a copartnership, as alleged. It is admitted that at the time of this transaction the Pacific Coast Steamship Company was the owner of the steamer "Bonita," on which the grain was shipped, and was then operating her; that the grain was shipped on board of the "Bonita" at Moss Landing, to be from said landing transported and delivered to the Howard Commercial Company in the port of San Diego, all in the State of

California, to wit: "2,448 sacks of barley, marked '96,' and weighing 271,510 pounds." That is admitted.

This further allegation of paragraph 3 is not admitted at least not in the denial as to this specific particular; that is, "that said Moore, Ferguson & Co. then and "there agreed, in consideration that the same was so "shipped and should be so transported and delivered, to "pay to libelant the sum of $4.35 per ton of 2,000 "pounds, for each and every such ton of the same so "shipped and so transported and delivered. That at the "time aforesaid, to-wit: the time said Moore, Ferguson "& Co. so shipped such barley, it was agreed by and "between said Moore, Ferguson & Co. and libelant, at "the special instance and request of said Moore, Fergu-"son & Co. that such barley should be delivered to the "Howard Commercial Company at said San Diego, "upon the payment by said Howard Commercial Com-"pany to libelant, upon such delivery, of the sum of "$2.50 per ton of 2,000 pounds, for each and every "such ton that should be so delivered, which sum, of "$2.50 per ton so to be paid, should be credited as a "payment on account, toward the payment of said sum "of $4.35 per ton agreed to be paid by said Moore, Fer-"guson & Co., as above stated, the balance of such sum "of $4.35 per ton, to-wit: the sum of $2.10 per ton of "2,000 pounds, said Moore, Ferguson & Co. promised "and agreed, such delivery of such barley being first "made, to pay, on demand, to libelant."

The next paragraph, 4, which I shall read is expressly admitted in the answer:

"That thereupon, and thereafter, said barley, and all

" thereof, was transported on said steamer, and on, to wit:
" the 6th day of November, 1894, was delivered in good
" order and condition to said Howard Commercial Co.
" at said San Diego, in full compliance with the agree-
" ment above stated, and there was paid to libelant upon
" such delivery by said Howard Commercial Co., and
" the same was accepted by libelant pursuant to the
" agreement with said Moore, Ferguson & Co., the sum of
" to wit: $339.38, being the sum of $2.50 per ton of
" 2,000 pounds of such barley so shipped and so deliv-
" ered."

That allegation is expressly admitted in the answer, and, it seems to me, carries the whole proposition with it, because it is an express admission that the barley was delivered pursuant to the contract and agreement set out in the preceding paragraph, paragraph 3, and, in my view, leaves nothing further to be said upon the subject.

The next paragraph, as to the demand and refusal, is also admitted, except that there is denial that there is now due the libelant, freight on the barley so shipped, the sum of $251.15, together with interest on said sum.

It is denied that any damage has resulted. It is admitted, by a failure to deny, that all and singular the premises are true.

Mr. Treadwell. If the Court please, with regard to the question of pleadings suggested, I understand it to be a rule that the allegation of the pleadings once explicitly denied need not be denied over again. The contract referred to is expressly in terms denied, and the other contract, as alleged by us, is set up. The mere re-

ference in other parts of the complaint to the contract, does not require any answer.

The facts of this case, as we shall expect to prove them, are these:

The Pacific Coast Steamship Company is a common carrier by sea only, but it has also a warehouse at Moss Landing at Monterey bay, in which it receives goods as a warehouseman. At Moss Landing there is a railroad which comes in from the interior, and which is not owned or controlled in any manner by the Pacific Coast Steamship Company, but by an entirely independent railroad. The Howard Commercial Company is a firm doing business in San Diego. Moore, Ferguson & Co., the respondents in this case, are commission merchants buying and selling grain and produce on commission. They received about this time, an order from the Howard Commercial Company, to purchase for them a certain amount of barley within a fixed price—that is, within a given limit. Moore, Ferguson & Co., were unable to find any barley in San Francisco which would bear that price, which they would purchase within that limit. They finally were informed by Waterman & Co., of this city that they had at Moss Landing a quantity of barley which they would sell for a certain price, and which Moore, Ferguson & Co. thought, if proper freight charges could be arranged, would bring it within that limit. Whereupon Moore, Ferguson & Co. applied to the libelant in this case to name a freight rate from Moss Landing to San Diego. At that time the Howard Commercial Company had a special contract with the Pacific

Coast Steamship Company, making its rate from San Francisco to San Diego $2.50 a ton on grain.

In response to this inquiry, the Pacific Coast Steamship Company said that they would ship the barley for Moss Landing to San Diego at $3.10. At the time that that conversation was had, or at a conversation occurring immediately after, Mr. Cooper, the chief freight clerk of the Pacific Coast Steamship Company, informed the respondents in this case that there might be back charges on that grain, which would have to be paid if the grain was shipped; to which Moore, Ferguson & Co. responded that they would ascertain about that; that they had not yet seen the warehouse reciept. Subsequently, Moore, Ferguson & Co. saw the warehouse receipt in the hands of Waterman & Co., and that warehouse receipt, which is an ordinary negotiable warehouse receipt, contains these terms: that the grain is held there subject to storage charges which are mentioned, and also for shipment to San Francisco at a given rate, the storage charges at the warehouse being separately stated, and the rate of freight to San Francisco being separately stated. The warehouse receipt also contained an express agreement that the owners of the grain may, if they desire, withdraw it from the warehouse at Moss Landing on paying the warehouse charges. On this receipt were endorsed warehouse charges 25 cents a ton. Thereupon, Moore, Ferguson & Co. communicated with the Pacific Coast Steamship Company, through Mr. Cooper, and informed him they had seen the warehouse receipt, and there were charges on it of 25 cents per ton, which they would pay, and gave to Mr. Cooper a memorandum to that effect. They

made no objection, and mentioned no railroad charges, nor were such known to the parties, nor was it endorsed on the warehouse receipt.

On that state of things, Moore, Ferguson & Co. purchased the grain from Waterman & Co., deducting 25 cents storage, and had the grain shipped by the Pacific Coast Steamship Company. Not until some time after that was shipped was anything said about railroad charges.

Your Honor will see the only question at issue is, was there anything said to Moore, Ferguson & Co. at the time of this transaction about railroad charges, or anything from which they might take notice that there were railroad charges.

On that question the evidence perhaps will be conflicting. I should further state that the full amount of the freight under this contract, including the 25 cents for storage, was tendered by the respondents before the commencement of this suit, and immediately to the Pacific Coast Steamship Company, and by them refused. That allegation is made in the answer. The money is paid into court.

Mr. Towle. I understand, so far as the evidence in the case is concerned, all you propose to controvert is the conversation which took place between the representatives of Moore, Ferguson & Co., and the representatives of the Pacific Coast Steamship Company, with reference to railroad charges on this, which Moore, Ferguson & Co. agreed to assume.

Mr. Treadwell. I understand that is the difference between us as to the facts.

G. H. Cooper, called for the libelant, sworn.

Mr. Towle. Q. Are you in the employ of the Pacific Coast Steamship Company? A. I am.

Q. Were you in their employ at the time of the transaction involved in this suit? A. Yes, sir.

Q. What had you, if anything, to do with the matter in controversy; were you the representative of the Pacific Coast Steamship Company in that matter?

A. Yes, sir, I was.

Q. Will you kindly state to the Court the entire occurrence that took place between you and the representative of Moore, Ferguson & Co., with reference to the shipment of this lot of barley to the Howard Commercial Company, and the collection of the $2.50 per ton from them on its delivery, and how the balance of the amount was to be collected?

A. Mr. Ferguson telephoned to me for our rate on about 100 tons of barley from Moss Landing to San Diego to the Howard Commercial Company. I told him our local rate from the landing to San Diego was $3.10 per ton of 2000 pounds. He asked me if we could not make the same rate on that particular shipment of barley as applied to Mr. Howard's shipments from San Francisco of $2.50 per ton. I told him we could not; furthermore, that the rate of $3.10 per ton applied only from Moss Landing to San Diego, though no grain originated at Moss Landing; that there would probably be charges on the grain from some point on the narrow gauge railroad to Moss Landing. He then stated that he might wish to have the grain delivered to Mr. Howard at the same rate applied on the shipment from San Francisco, $2.50, and asked if

that could be arranged in case we found it necessary. I told him I thought it could. He said: "I will see you about it later." Mr. Cook came down on November 3rd, I think in the morning, about that matter, and asked if we could arrange it. I told him I thought we could. I again spoke to him about the possibility of back charges on it. I told him that the shipment had gone forward, and that we had no record of it, it being billed on board the steamer, and suggested it might be better to let it go forward, the full amount to be collected, and they settle with Mr. Howard subsequently, between themselves. He said he thought perhaps that would be the better plan, and he would let me know later on. He came down again the same afternoon, and stated that he had found that his company had charged Mr. Howard up with $2.50 per ton only, and that is all they could charge Mr. Howard, no matter what the back charges might be on the shipment, therefore he would like us to send a telegram. I again spoke to him about the possibility of back charges. Mr. Goodall was present at the conversation. Everybody else had left. It was on Saturday afternoon, and they close at 4 o'clock, and it was some time after 4 o'clock. I told him we had no record of the shipment. I did not know the number of sacks, and if he could advise me Monday morning about that we would telegraph. He came down, I think the following Tuesday morning, and said he would like to have us telegraph. I again went over with him the question of the probability of back charges from some point on the railroad to Moss Landing, and asked him, in view of that probability, did he wish us to telegraph to our agent to have

the grain delivered at $2.50 per ton, collecting the balance from his company here. He expressed his wish in the affirmative. A telegram was written by me, submitted to Mr. Cook, Moore, Ferguson & Co's representative, and sent. The grain was delivered at $2.50, the bill rendered by us to Moore, Ferguson & Co. at $4.35; $3.10 per ton our freight, $1.00 back charges, and 25 cents storage. Moore, Ferguson & Co. refused to pay the charges from the original point of shipment to Moss Landing—railroad charges.

The Court. Q. Where were you located at the time these negotiations took place?

A. On Market street, in the office.

Q. You said you telephoned; where where was the telephone message from?

A. From Moore, Ferguson & Co.'s office.

Q. In this city? A. Yes, sir.

Q. With whom did you say you communicated by telephone? A. I talked with Mr. Ferguson.

Q. Your personal interview was with Mr. Cook?

A. Yes, sir.

Mr. Towle. Q. You have spoken of a telegram which was sent. Will you look at this and see whether that is a copy of the telegram? (Handing.)

A. That is a true copy of the telegram.

Mr. Towle. The telegram reads:

"Nov. 6th, 1894.

"To S. T. Johnson, San Diego, Calif.

"At request Moore, Ferguson collect only two dollars "fifty per ton on Howard's twenty-four forty-eight bar- "ley from Moss Ldg. ex Bonita, turning in relief voucher

" for storage and balance freight rate to be collected from " them.

" GOODALL, PERKINS & Co."

(*Marked Libelant's Exhibit* " 1.")

Q. Since that time, has any settlement been had with the railroad company with reference to these railroad charges on that lot?

Mr. Treadwell. Objected to as immaterial.

The Court. I overrule the objection.

Mr. Treadwell. We will take an exception.

A. A settlement has been made.

Mr. Towle. Q. What amount was paid to them on that settlement, if any?

Mr. Treadwell. The same objection.

The Court. Objection overruled.

Mr. Treadwell. Exception.

A. At the rate of $1.00 per ton.

Mr. Towle. Q. When was that settlement made?

A. It was made in the adjustment of through traffic for November, 1894.

Q. Do you remember the amount that was paid?

A. I think $135.76.

Q. During the time that this negotiation was going on between yourself and the representative of Moore, Ferguson & Co., did you have occasion to consult with reference to it with any one else in the office of Goodall, Perkins & Co.?

A. I spoke to Mr. Goodall about it prior to sending the telegram.

Q. Which Mr. Goodall?

A. Mr. Edwin Goodall, now present.

Q. That is while the matter of sending this telegram was under consideration? A. Yes, sir.

Q. And while the representative of Moore, Ferguson & Co. was there?

A. Yes, sir, he was there.

Q. Did he know that you were going to consult Mr. Goodall? A. I did not, I think.

Q. What was the occasion of your consulting him?

A. I felt assured that there would be a charge of the railroad company to Moss Landing, knowing that no grain originated at Moss Landing, and very little hauled there. I spoke to Mr. Goodall, saying that I was somewhat afraid there would be some controversy about that charge. He said, "I guess not; I know Moore, Ferguson & Co. quite well; I guess we are perfectly safe in sending the telegram; make it read, however, that it was sent at their request," which was done.

Mr. Treadwell. We move to strike out so much of the answer of the witness as relates to the conversation with Mr. Goodall, on the ground that it is not responsive to the question. We could not object to the question, but it did not call for that conversation. The conversation was not in the presence of Moore, Ferguson & Co., and is not competent against them.

The Court. That will have to go out.

Cross-Examination.

Mr. Treadwell. Can you state, Mr. Cooper, what were the precise words that you used in speaking with Mr.

Ferguson over the telephone with regard to back charges on this grain?

A. I stated that no grain originated at Moss Landing, and I thought there would be charges from some point on the narrow-gauge railroad to Moss Landing. I cannot state the precise words, but that is the substance of it.

Q. Are you quite sure that you mentioned the railroad in way in that conversation? A. I am.

Q. At that time, or at any time prior to the final shipment of this grain, was there any charges on the books of the Pacific Coast Steamship Company of any railroad freight on this grain?

A. There was not in our office.

Q. Was there any in the office of the Pacific Coast Steamship Company to your knowledge?

A. There must have been a knowledge of such charge by our warehouse man at Moss Landing.

Q. Excuse me, that is not the question. Was there on the books of the Pacific Coast Steamship Company at any time prior to the final conclusion of this transaction, any charge entered of railroad freight on this grain?

A. I know of no such charge.

Q. Had there, prior to that time, ever been on any lot of grain stored at Moss Landing, any charge on your books of railroad freight?

A. Not on our books in the office, to my knowledge.

Q. Do you know whether or not there ever had been any such charge on the books of the railroad company? A. I cannot say.

Q. You never knew of any, did you?

A. I know nothing about their accounts.

Q. The railroad company is an entirely independent concern, is it not?

A. It is independent except that we have a traffic arrangement with them.

Q. That is, you had contract relations with them?

A. Yes, sir.

Q. Did you inform Mr. Ferguson, or any representative of Moore, Ferguson & Co., what your contract arrangements with that railroad were?

A. I did not.

Q. You stated that you had a settlement subsequently with the railroad company. Was that settlement in writing? A. It was.

Q. Have you that paper?

A. It is there (pointing).

Q. Will you kindly produce it, or if counsel has it, will he produce it? Is that the paper to which you refer (handing)? A. It is.

Q. When was that statement rendered to your company?

A. It was rendered monthly. Sometimes there is some delay in rendering it. The date will show on it. It is a regular monthly statement. There is a letter from our agents inclosing it, I think you will find.

Q. Will you kindly examine the paper and see if you can inform us when it was rendered?

A. The statement was forwarded to us on February 11, 1895, enclosed in a letter from our agent at Moss Landing.

Q. February 11, 1895? A. Yes, sir.

Q. Some months prior to the receipt of this statement, then, you had demanded this sum of $1.00 per ton from Moore, Ferguson & Co., had you not?

A. Yes, sir, we had.

Q. You demanded that as early as November, 1894, did you not? Yes, sir, November, 1894.

Q. At the time that you made that demand, had there yet been any entry on your books, or so far as you know on the books of the Railroad Company, of any such charge? A. There had not.

Q. How then, did you ascertain, at the time of that demand, that there was such a charge?

A. Because the shipment was billed from Blanco on the manifest of the steamer carrying the freight from Blanco at $4.10 per ton freight, 25 cents storage, our rate being $3.10 per ton, and there was a charge of $1.00 from Blanco to Moss Landing, that being the regular rate paid them on the south-bound grain shipments.

Q. That was your manifest, was it not?

A. The manifest of the steamer.

Q. Prepared by your agents?

A. Made by our purser from the original manifest of our agent at Moss Landing.

Q. Do you know where he got the information on which he included $1.00 per ton freight from Blanco?

A. We have a general contract with them to pay them $1.00 per ton on grain from Blanco; south bound.

Q. When you had the various conversations with Mr. Cook, you stated that you told him there might be

back charges on this grain. Are you sure you used that language to Mr. Cook?

A. There might be charges of the Railroad Company to Moss Landing.

Q. No; that is not what you said. You said, if I took it down correctly, in three different conversations with Mr. Cook, there might be back charges on it. Is that correct, or not?

A. I might have said back charges.

Q. Is that the language you used, or not?

A. I think possibly I did say back charges. I also said railroad charges.

Q. To Mr. Cook? A. Yes, sir.

Q. Can you explain, Mr. Cooper, why you did not think of that in testifying on your direct examination, as to what those conversations were?

A. I think I did.

Q. You think you did? A. I thought I did.

Q. Has there ever been any other occasion, Mr. Cooper, in which these back charges—railroad charges—have been charged to any shipper or to any person taking the train at Moss Landing?

A. Kindly repeat the question.

Q. Has there ever been any other occasion in which you have charged a person shipping the grain from Moss Landing, or taking the grain from the warehouse at Moss Landing, any sum of railroad charges?

A. Those charges are generally collected from the consignee; in fact, they are almost invariably.

Q. Have you ever made any charge against any person or firm of this kind before?

A. We have always collected that charge on grain from the same point going south, that is, since the arrangement was first made. We have always collected at the rate of $1 per ton from Blanco to Moss Landing on grain going south.

Q. That is what I asked. Have you ever on any occasion actually collected such a charge?

A. Yes, sir.

Q. Can you name one of those occasions?

A. I cannot name any specific occasion, except that it is done always when grain is forwarded from that point, or any point on that railroad going south.

Q. Could you, by examination of your books, refresh your memory, and find any instance in which you have ever made such a charge before?

A. I think there is no trouble about that.

Q. Kindly look them up between now and the next session of the court.

A. We can produce a manifest showing that bill.

Q. You understand the question? Can you, by an examination of your books, refresh your memory and find any instance in which you have ever made such a charge before, and let us know at the next session of the Court?

The Court. Do you know where Blanco is—where it is located? It is on the narrow gauge is it not?

A. Yes, sir.

Q. A shipping point on the narrow gauge in Salinas valley? A. Yes, sir.

Redirect Examination.

Mr. Towle. Q. When you say that you know of no charges being made on the books of the Pacific Coast Steamship Company, you refer to charges which come under your observation in the local office in San Francisco, do you not? A. Yes, sir.

Q. As to what charges may have existed on the books of the warehouse at Moss Landing you are not informed? A. No, sir.

Q. So do not assume to testify with reference to their presence or absence? A. I do not.

Q. In the conduct of the business of the Pacific Coast Steamship Company at that warehouse, do they forward those matters to you except as they come incidentally in connection with grain shipments?

A. They do not.

Q. So that such charges might exist on the books there and you know nothing about them until occasion came to collect it as part of the freight transportation?

A. Yes, sir.

Q. That is so, is it? A. Yes, sir.

Q. This statement furnished here, to which your attention has been called, of settlement with the Railroad Company, is this an ordinary monthly statement?

A. It is.

Q. Furnished entirely by the Railroad Company?

A. Entirely.

Q. In the usual form. A. In the usual form.

Q. And in the usual course of business?

A. Yes, sir.

Q. Are you aware of this matter having been called to the Railroad Company's attention prior to the time that this statement was furnished?

A. No, sir; they were not informed in any manner with reference to that shipment.

Q. So that this charge appears in this statement as in ordinary statements furnished, does it?

A. It does.

Q. And that has been settled in the same way?

A. Yes, sir.

Q. You have spoken of the manifest of the steamer. What rate was stated upon that for this lot of grain?

A. $4.10 freight rate.

Q. And what other rates?

A. 25 cents storage.

Q. That was the rate on which freight was charged; that is the sum demanded upon the transportation of this barley? A. It was.

Q. Upon that amount $2.50 was paid at San Diego?

A. Yes, sir.

Q. And then a demand was made on Moore, Ferguson & Co for the balance of the $4.35?

A. Yes, sir.

H. W. Goodall. called for libelant, sworn.

Mr. Towle. Q. Were you connected with the Pacific Coast Steamship Company in November last?

A. No, sir; I was not.

Q. What were you doing at that time?

A. I was a member of the firm in which I am now doing business, Piper, Aden, Goodall & Co.

Q. Were you in the office of Goodall, Perkins & Co. at any time when Mr. Cooper and Mr. Cook were having a conversation relating to the shipment of this barley?

A. I was; one Saturday afternoon, after four o'clock. It is the custom of the Pacific Coast Steamship Company to close their office at four o'clock on Saturday. I think all the clerks, or the greater portion of them, had left the office. Mr. Cook came in. I was standing at the counter with Mr. Cooper at the time, and being there, I overheard the conversation between Mr. Cook and him.

Q. State so much of that conversation as you overheard at that time.

A. I understood that the conversation was in relating to some grain of some kind that was in shipment from some point on the narrow gauge railroad—on the Pajaro Valley Railroad to San Diego, to the Howard Commercial Company.

Mr. Treadwell. Please only answer the question put to you. You are asked to state what you heard of the conversation.

Mr. Towle. Strike out what he has said.

A. This is what I heard of the conversation, that I am telling you now. This grain was to be shipped to the Howard Commercial Company from Moss Landing by the Pacific Coast Steamship Company, and had originated on the narrow guage road.

Mr. Treadwell. I submit the witness is not answering the question. He should state what the parties said and who said it.

The Court. (To the witness) Just state what Mr. Cooper said and what Mr. Cook said, as far as you know.

A. As far as I remember, Mr. Cook, representing Moore, Ferguson & Co., came in an wanted to ask Mr. Cooper if some arrangement could not be made whereby this grain could be delivered to Mr. Howard at the rate of $2.50 per ton; that they had arranged with him that all grain shipped by Moore, Ferguson & Co., to Mr. Howard should not be charged more than $2.50 freight. Mr. Cooper said, possibly there would be back charges, or railroad charges, at Moss Landing, which Moore, Ferguson & Co. would have to assume in order to secure the release of the grain at the usual rate at San Diego. He impressed that on Mr. Cook in my presence, and agreed with Mr. Cook to write out a telegram that evening, and Mr. Cook was to call in the following Monday morning with reference to the dispatch which was to be forwarded at that time.

Q. That is the substance of the conversation as you remember it? A. That is as I remember it, yes.

Q. That is the only time you were present when this matter was referred to? A. The only time.

The Court. Q. Nothing was said about railroad charges? A. Yes, there was.

Q. What was said about railroad charges?

A. Simply that there would probably be charges of the narrow gauge railroad on this grain which would have to be assumed by Moore, Ferguson & Co., in order to secure the grain at San Diego at the usual rate.

Q. Who said that? A. Mr. Cooper.

Cross-Examination.

Mr. Treadwell. Q. Are you sure that those words were used, or any words relating to the Railroad Company?

A. I am quite sure there were words used in relating to the Railroad Company.

Q. The Railroad Company was mentioned by Mr. Cooper? A. Yes, sir.

Q. At that time the grain had been shipped, had it not?

A. I don't know anything in regard to that.

Q. You understood from the conversation, that it had?

A. I understood that the grain was in Moss Landing: that is the impression that I got from the conversation.

Q. Can you give the date of the conversation?

A. I could not, exactly. I know it was sometime in November.

Q. The precise date?

A. I understand now, November 3d.

Q. You think now, Nov. 3d? A. Yes, sir.

Q. At that conversation a telegram was prepared, or agreed to be prepared, to the agent of the Pacific Coast Steamship Company at San Diego? A. It was.

Q. The grain had been shipped and was on its way, was it not, otherwise there would be no occasion for such a telegram?

A. Possibly it might be at Moss Landing ready to go?

Edwin Goodall. called for the libelant, sworn.

Mr. Towle. Q. You are a member of the firm of Goodall, Perkins & Co.? A. Yes, sir.

Q. You were in November last? A. Yes, sir.

Q. Do you remember having the matter of the shipment of this barley by Moore, Ferguson & Co. to San Diego, brought to your attention? A. Yes, sir.

Q. By whom? A. By Mr. Cooper.

Q. What, if anything, had you to do with the arrangement that was finally consummated?

A. Well, Mr. Cooper came into my office and informed me—

Mr. Treadwell. We object to any conversation between the witness and Mr. Cooper not in the presence of one of the respondents.

Mr. Towle. I submit we have a right to show that Mr. Cooper was authorized to make this representation.

Mr. Treadwell. There is no dispute about that. The only dispute is the question of fact: did he make it? We insist upon our objection.

The Court. I sustain the objection.

Mr. Towle. You have heard the telegram read?

A. Yes, sir.

Q. Was that submitted to you before it was sent?

A. Yes, sir.

Q. And you authorized it being sent?

A. Yes, sir.

Q. You yourself did not come personally in contact with Mr. Cook or any representative of Moore, Ferguson & Co.?

A. Not at that time; not at any time with reference to this transaction.

Q. What had been the relation, prior to this time, between the company and Moore, Ferguson & Co.—between the Pacific Coast Steamship Company and Moore, Ferguson & Co.?

A. They were very friendly, and are now, so far as I know.

Q. Had accommodations before this been solicited by them?

A. I think so; it is my recollection that they had.

Q. And granted? A. Yes, sir.

Mr. Treadwell. No questions.

Mr. Towle. It is conceded, if the Court please, though there might be technical proof of it, that this grain was shipped from Blanco to Moss Landing on the railroad, and that the back charges were $1.00 per ton.

Mr. Treadwell. We do not know anything about the fact, but we are entirely willing to take counsel's statement.

Mr. Towle. We rest our case.

Testimony for Respondents.

E. W. Ferguson called for the respondents, sworn.

Mr. Treadwell. Q. You are a member of the firm of Moore, Ferguson & Company, and one of the respondents in this suit? A. Yes, sir.

Q. And were so in November last?

A. Yes, sir.

Q. Will you state how you came to purchase the barley in controversy in this action?

Mr. Towle. We object to the question as immaterial.

Mr. Treadwell. We state our purpose in proving this is: The question at issue is simply which of these witnesses is correct in this recollection of the conversation which took place, and we propose to show circumstances which will determine that necessarily Mr. Cooper must be mistaken.

Mr. Towle. We object to the reasons which operated on him then.

The Court. I do not see that the reasons operating on a person would be a circumstance.

Mr. Treadwell. I had better state what the circumstances are, and then your Honor can rule upon it. In order to determine the credibility of witnesses, to test their recollection and ascertain, in case of conflict, which is correct, the surrounding circumstances may always be looked into for the purpose of ascertaining which is possibly correct. If the circumstances are such that the transaction could not, in accordance with ordinary experience, have taken place, that certainly is a circumstance. The fact is this, which we seek to elicit by this line of questioning. That the transaction concerning this grain had a very narrow margin, and that no business man could by any possibility have entered into this transaction as Mr. Cooper states. That is, would have bought this grain with an indefinite amount of charges on it, if it were true, as Mr. Cooper states, that there might be an indefinite amount of railroad charges on the grain. No ordinarily fair business man could possibly have made such a bargain as this. We think those are proper circumstances to prove, otherwise it is impossible to deter-

mine which is correct. We want to show what the con tract was on which he bought the grain.

(After argument). With the permission of the Court, I will withdraw the question to lay a better foundation for it.

Q. Did you have a conversation with Mr. Cooper, who has testified on the stand, through the telephone with reference to this transaction? A. I did.

Q. Do you remember when the conversation occurred? A. I do.

Q. When?

A. It was on the morning of October 25th or 26th. I think the 26th.

Q. Who opened that conversation? A. I did.

Q. State what you said in opening that conversation?

A. I said to Mr. Cooper that we had an inquiry for barley for the Howard Commercial Company at San Diego for 50 tons of barley; that I could not find any in San Francisco; that there was a lot at Moss Landing that was available if a rate could be obtained by which it could be shipped. The barley in the meantime had been quoted to me at a price free on board at Moss Landing.

Q. What did Mr. Cooper reply to that, or did you say anything before he replied?

A. Mr. Cooper could not give me a reply; could not give me rate at that time. That was on the Produce Exchange. He could not give me a rate until he consulted with his superiors. He was to let me know in a short time—half an hour or so. I did not hear from him.

Q. I am not asking about the further conversation. Is that the whole of this first conversation?

A. That is the whole of the first conversation.

Q. When did you have a conversation with him again on the subject? A. About half an hour later.

Q. How was that conversation held?

A. I called him up again through the telephone.

Q. What did he say?

A. For the rate on the barley he gave me a rate, $3.10 from Moss Landing to San Diego.

Q. You say he gave you. What did he say?

A. He said the rate on the barley would be $3.10 from Moss Landing to San Diego.

Q. Did you make any reply to that?

A. I did. I said they had a contract with the Howard Commercial Company, or to that effect, of $2.50 from San Francisco, and I thought they should be entitled to the same rate, particularly as it was nearer San Diego than San Francisco. He said $3.10 was the rate.

Q. Was there any further conversation at that time?

A. No further conversation.

Q. At either of those conversations through the telephone did Mr. Cooper say anything to you about charges of any kind on this grain? A. Nothing whatever.

Q. When, if ever, did you first hear anything concerning those charges from the Pacific Coast Steamship Company?

A. After I telephoned to him a second time, after this which I have just related.

Q. State that conversation.

A. Perhaps if I state the conversation I had in the meantime it would be better.

Q. I want to get at the conversations just as they occurred. You have stated the two occurred within half an hour of each other. A. Yes, sir.

Q. When did the next conversation occur?

A. The next conversation occurred in the afternoon of that same day, somewhere about three or four o'clock, as I remember.

Q. What was the conversation?

A. After completing —

Q. Just state the conversation.

A. The conversation was that I thought a trade had been consummated for the barley, but instead of being 150 tons, there were a certain number of sacks, about 135 tons.

The Court. Did you say 150 or 50 tons at first?

A. Fifty tons at first. If I am allowed to explain, I could tell the circumstances connected with it which made the difference.

Mr. Treadwell. Just state the conversation.

A. That there were 135 tons or 150 tons. I didn't know just exactly the number of tons that it would amount to, only approximately, and that I had prospects of making the trade on the terms which he had quoted —that is, the freight term he had quoted.

The Court. Q. $3 10 per ton?

A. $3.10 per ton. I wanted to fortify myself so as to make no mistake, because the margin was very small.

Mr. Tuttle. Q. Was all this said to him?

A. Not in reference to this margin.

Mr. Towle. Then I ask that it be stricken out.

The Court. Let it be stricken out.

Mr Treadwell. Q. Only say what you said to Mr. Cooper.

A. I said there were prospects of consummating the trade for the barley, and that there would be, as I stated, 135 or 150 tons of it.

Q. What reply did Mr. Cooper make?

A. I said I thought they ought to be entitled to $2.50 rate from Moss Landing, particularly as it was in excess of the 50 tons which they were entitled to a $2.50 rate on. I don't remember that any further conversation took place between us, except that he still refused to give any reduction on the $3.10 rate.

(An adjournment was here taken until to-morrow.)

FRIDAY, AUGUST 30th, 1895.

E. W. Ferguson, recalled, and direct examination resumed.

Mr. Treadwell. Q. You have related two conversations over the telephone with Mr. Cooper, both occurring on the same day? A. Three.

Q. Yes, three on the same day. When was the next conversation you had with Mr. Cooper?

A. Perhaps before going ahead with that, I have fixed in my mind since I was here before, the exact date.

Q. What was the exact date of the first conversation? A. On the 26th.

Q. October 26th?

A. October 26th. The fourth conversation had with Mr. Cooper on that very day was after I completed the trade for the barley, on the basis of his freight rate, and I telephoned Mr. Cooper immediately that I had made the trade, and closed it on that basis, and that as the Howard Commercial Company had a rate with them of $2.50 per ton from San Francisco they knew no other rate, and I had to quote them on the basis of San Francisco rates, consequently as there was 60c. per ton more for the barley from Moss Landing to San Diego than from San Francisco to Moss Landing, he should bill us the 60c. here, or we would send a check to the office, as they might desire, which was apparently satisfactory, and so Mr. Cooper stated. Mr. Cooper then, however, made the remark "There may be some advance charges, or back charges."

Q. What were the precise words he used?

A. Back charges.

Q. What did you say to that?

A. I said that we had bought the barley free on board at Moss Landing; of course back charges did not concern us; that we had nothing to do with.

Q. Was that the whole of the conversation?

A. I stated to him at the same time, in regard to arranging for a steamer, to bring it forward as promptly as possible, because they were in a hurry for the barley.

Q. Anything else?

A. There was some question in regard to which steamer would go there first. There was the "Santa Cruz" and the "Bonita," both running down the coast as freight boats, and there was a question as to which

would go first. We wanted it to go by the first freight boat that would go, and we discussed that matter over the line. Nothing definite in regard to it was arrived at.

Q. When was your next conversation with Mr. Cooper?

A. The next morning, the morning of the 27th, Mr. Cooper telephoned to the office—I was there and answered the telephone—stating that they had telephoned to Moss Landing in regard to this barley, and that we had no barley there. I replied, no, that we had no barley there; that we had bought the barley from Waterman & Co. free on board at Moss Landing, and had not yet obtained the warehouse receipt for it. Mr. Cooper stated, or rather requested that we send them the warehouse receipt and give them the details as soon as possible, so that they could arrange for shipment, which I agreed to do. About, probably two hours later, or thereabouts, Waterman & Co. brought in their invoice for the barley, and the warehouse receipt accompanying it, showing the barley to be in Moss Landing warehouse and had been there for a portion of a month, which carried —

Q. You need not state what the contents of the receipt was.

A. We stated to Mr. Cooper that there were back charges —

Q. One moment. Is this another conversation with Mr. Cooper?

A. This was during this time, when I called him up.

Q. That is before you wrote the warehouse receipt?

A. No sir; I have got through with that conversation.

Q. If there was another conversation, state when that occurred?

A. After I got the warehouse receipt.

The Court. Q. After Waterman & Co. brought in the warehouse receipt? A. Yes sir.

Q. You then called up Mr. Cooper again?

A. Yes sir.

Q. The next day?

A. No sir; the morning of the 27th, the same morning, and informed him that we had now the warehouse receipt for the barley.

Q. When was the other conversation when Mr. Cooper told you there was no barley there?

A. That same morning. That was the first conversation. He called me up.

Q. What time of day was that?

A. It was between, I think, 9 and 10 o'clock in the morning.

Q. What time was the last one, or at least, the next one?

A. The next one was, as near as I can recollect, between 11 and 12 o'clock, or somewhere near about 11 o'clock, that same morning. I stated to him that we now had the warehouse receipt for the barley, and that there was a storage charge of 25c. on the warehouse receipt, making 85c. in all that we were to pay them, adding the 25c. storage to the 60c. extra freight, or difference in reight and that we would send them a check for it, or they would

bill it to us, as the case might be, whichever was more agreeable to them.

Mr. Treadwell. Q. What did Mr. Cooper say to that? A. That was agreeable to Mr. Cooper.

The Court. Q. Did you tell him there were back charges of 25c. for storage? A. I did.

Q. And adding the 60c. additional freight rate, it would make 85c.? A. Yes, sir; it did.

Q. In so many words? A. In so many words.

Q. And that you would give them a check for that amount?

A. Or bill it to us, as the case might be. That explained to me Mr. Cooper's remark the day before about back charges, and so that Mr. Cooper would understand it thoroughly, I immediately informed him in regard to this 25c.

(*Mr. Treadwell.*) Q. Was there nothing more in that conversation?

A. Nothing, except that I stated we would send him the warehouse receipt as soon as possible.

Q. Did you send it to him?

A. I left the instruction in the office in regard to the details of the matter, and it was attended to from the office.

Q. When was your next conversation with Mr. Cooper, if you had any?

A. There was another conversation, I think, during that same day. I would not be positive now, whether it was with Mr. Cooper or with Mr. Evans.

Q. Who is Mr. Evans?

A. Mr. Cooper's assistant—or, with a young man,

that sometimes attends to the telephone, and brings messages back and forth to Mr. Evans and Mr. Cooper. I would not be positive in regard to which of them, but the conversation was to this effect. I asked the question, which steamer they had decided to ship the barley by, because I was anxious to telegraph to the Howard Commercial Company, which steamer it was going by, so that they would make their arrangements accordingly. The reply came back that they had decided to take the barley to San Francisco, and ship it on their regular passenger steamer from San Francisco. That made no difference to me, of course, as long as it reached its destination.

Q. Was that all the conversation?

A. That was all of that conversation.

Q. When was your next conversation with these gentlemen, or either of them?

A. Later again there was a conversation with the office in which—I would not be positive who it was that answered that, either.

Mr. Towle. Q. Was this the same day? Were all these conversations on one day?

A. Yes, sir; as near as I can recollect, they were on the same day. The last conversation may have been on the following day. I would not be positive as to that.

Q. Were they by telephone?

A. All by telephone.

Q. All this was through the telephone?

A. All this was through the telephone.

Mr. Treadwell. Q. October 26th and 27th?

A. Yes, sir; possibly this last may have been the 28th.

The Court. That would be Sunday?

A. Then it would not be Sunday. It must have been on the 27th?

Mr. Treadwell. Q. What was that conversation?

A. The conversation was that they had changed their minds in regard to bringing it to San Francisco, and that they were going to ship it by the "Bonita."

Q. Did you have any further conversation with them about it?

A. No, sir; not until after the barley had been delivered; and then this question of freight rates—shall I state that?

Q. No. For whom were you purchasing that barley?

A. For the Howard Commercial Company of San Diego.

Q. Upon what instruction from that company?

Mr. Towle. I object to the question as immaterial.

Mr. Treadwell. That raises a question that was suggested once before, and I desire to follow that out with a remark or two.

[After argument.]

The Court. I shall sustain the objection.

Mr. Treadwell. We will take an exception.

The Witness. I would state here, if the Court will allow me—

The Court. Mr. Treadwell will ask you such questions as are proper.

The Witness. At the time that Mr. Cooper and I—

Mr. Treadwell. Never mind that. If you omitted any statement in any of those conversations which you have referred to, you can supply the omission; otherwise you need not say anything.

A. It was not a conversation.

Q. Never mind then. At the time of this transaction, or during any portion of the time occupied in these negotiations, did you know where this grain came from?

A. I did not.

Q. Did you know anything about the arrangement between the Pacific Coast Steamship Company and the Railroad Company? A. I did not.

Q. Or did you know that they had any arrangement with them? A. No, sir.

Q. Had you had any information on that subject, from any source? A. None whatever.

Q. At any time since have you offered to pay any money on this account to the Pacific Coast Steamship Company?

A. A check has been sent from our office.

Q. I ask you if you made any offer?

A. Personally I did not.

Q. Who did?

A. It was made by instructions, from the office.

Cross-Examination.

Mr. Towle. Q. On how many different dates did these conversations occur, Mr. Ferguson?

A. They occurred on two dates.

Q. The 26th and 27th? A. The 26th and 27th.

Q. All over the telephone?

A. All over the telephone. The last conversation—

Q. Never mind the last conversation. Just answer the question.

A. (Continuing)—may possibly have been later than the 27th.

Q. In those conversations do I understand you to say that Mr. Cooper quoted to you a freight rate?

A. Yes, sir.

Q. Do I understand you to say that the proposition of the Howard Commercial Company paying $2.50 per ton was broached between you and Mr. Cooper?

A. Yes, sir.

Q. And he agreed to it at that time?

A. That he had agreed to the $2.50 rate?

Q. No. That he agreed that the Howard Commercial Company should pay $2.50, and the balance should be collected from you, in those conversations which you have testified to?

A. That he was to collect from the Howard Commercial Company the $2.50, and collect the difference from us.

Q. You say that was the arrangement between you and Mr. Cooper, by telephone?

A. Yes, sir, it was.

Q. On these dates? A. On these dates.

Q. Which one of those dates?

A. On the day of the 26th, the 60c. was agreed upon. On the 27th, when the back charges of 25c. additional were known, then I told him that the 25c. would be added to the 60c., making 85c. instead of 60c.

Q. When was the order to ship the grain given?

A. The order to ship he grain was given on the 27th.

Q. At that time you had the warehouse receipt?

A. We had the warehouse receipt.

Q. Prior to the 27th you had not seen it?

A. I had not seen the warehouse receipt prior to the 27th.

Q. Your arrangements with Waterman & Co. were that it should be furnished to you free on board?

A. Free on board at Moss Landing.

Q. So that the back charges did not concern you, whatever they might be? As between you and the Howard Commercial Company, for whom you were buying, whether it was 25c. or $2.50 was no concern of yours?

A. Did you say it was no concern of the Commercial Company?

Q. No concern of yours; having bought it free on board, the amount of back charges there on it was no concern of yours, or the Commercial Company?

A. No, sir.

Q. Then, how did it happen that you were negotiating with reference to paying the back charges, when Waterman & Co. were to pay those, and furnish it to you free on board?

A. Waterman & Co. did pay it, and I have got the bill here in regard to it, of the back charges, except the 60c.; that is, they deducted the 25c. from their invoice to us. The 60c. they had nothing to do with, because that was a difference in the Howard Commercial Company's contract with the Pacific Coast Steamship Company.

Q. Then when you finally arranged with Waterman & Co. you arranged with them that the back charges with them should be 25c. a ton? A. No, sir.

Q. When did you settle with Waterman & Co.?

A. I paid them—I gave them a check on their invoice on presentation of the warehouse receipt, deducting the charges which the face of the receipt called for, on the morning of the 27th.

Q. You paid them in full on delivery of the receipt?

A. Yes, sir; less the charge which the warehouse receipt called for, which is customary with negotiable warehouse receipts.

Q. You made no inquiry as to other charges upon the grain?

A. I did not, because it was not customary. Negotiable receipts are always payable in that way in the grain business.

Q. Since the controversy arose, have you made any demand on Waterman & Co. that they pay these back charges?

Mr. Treadwell. I object to the question as immaterial.

The Court. I sustain the objection.

Mr. Towle. Q. Had you any understanding with Waterman & Co. as to their liability to pay those charges? A. I have not.

Q. Do you know whether or not any one else had conversations with representatives of the steamship company about this same matter, after you did?

A. What is that?

Q. Whether anyone else representing Moore, Fer-

guson & Co. had conversations with representatives of the steamship company in regard to this matter, after you did?

A. Not as to contracting, but simply as to carrying out the details.

Q. Do you know of any visits that Mr. Cook paid?

A. Mr. Cook informed me that he had paid visits there.

Q. Did you regard this whole matter as definitely arranged when you finished your conversation by telephone? A. I did.

Q. If that was so, what occasion was there for Mr. Cook to go there?

A. To deliver the warehouse receipt, and get the receipt for it, or a shipping receipt for the barley.

Q. Upon what date was that done, if you know?

A. I judge that that was on the 27th, because that was the date on which the shipping instructions were given.

Q. That is the date that you were there?

A. I was not there at all.

Q. Or that you telephoned, then? A. Yes sir.

Q. Did you give Mr. Cook the receipt?

A. I did not.

Q. How did he get it, if you know?

A. Mr. Cook is a member of the firm, and has access to all such papers.

Q. Who got the receipt from Waterman & Co.?

A. I did.

Q. When you got it, did you deliver that to Mr. Cook?

A. My recollection is, that I delivered it to our bookkeeper or cashier.

Q. On that same day?

A. On that same morning, immediately.

Q. Your impression is, that the receipt was turned over to the steamship company on that same day, the 27th of October?

A. That is my impression.

Q. Did you get a shipping receipt from the steamship company, on turning that over?

A. We did not, as far as I know.

Q. Did you at any time?

A. We have got an acknowledgment, I have got it in my pocket now.

Q. What sort of an acknowledgment?

Mr. Treadwell. The paper will speak for itself.

Mr. Towle. Yes. Let me see it.

A. That is from Moss Landing however some days later.

Q. This is not from Moss Landing. (Handing it to the witness.)

A. I supposed it was. It is from Castroville.

Q. It is a letter to the agent there?

A. I did not read it carefully.

The Court. Q. Do Waterman & Co. have a place of business in this city? A. Yes sir.

Q. Grain dealers? A. Yes sir.

Mr. Towle. Q. Is not this the fact, Mr. Ferguson, that you telephoned and asked Mr. Cooper whether it could not be arranged that the Howard Commercial Company should pay $2.50, and that you here should

pay the difference, and that he said he thought it could?

A. I stated the difference—I stated the amount of the difference, and he said yes.

Q. I am asking you if this was not the conversation; whether you did not inquire of him whether such an arrangement could not be made, and that he said he did not know, but he thought maybe it could? Is not that the extent to which those negotiations had gone between you and Mr. Cooper, by telephone?

A. It was not.

Q. You are certain of that?

A. I am certain of that. The conversation and the contract was completed with Mr. Cooper in regard to it.

The Court. Q. You say Mr. Cook is a member of the firm? A. Yes, sir.

Q. And had full authority to transact business for the firm? A. Yes, sir.

L. H. Garrigus, called for the respondents, sworn:

Mr. Treadwell. Q. Where do you live?

A. I live in Salinas City.

Q. Are you acquainted at Moss Landing?

A. Yes, sir.

Q. Do you know whether any grain is raised around Moss Landing?

Mr. Towle. Objected to as immaterial. It is a collateral issue that does not cut any figure.

The Court. I overrule the objection.

A. Yes, sir.

Mr. Treadwell. Q. How is that grain taken to the warehouse at Moss Landing?

A. By a team, usually.

Q. Is there any considerable quantity of grain hauled to that warehouse by team?

A. It varies every year.

Q. Last year about how much grain, have you any idea?

A. It must have been several hundred tons.

Cross-Examination.

Mr. Towle. Q. Are you familiar with the business at those warehouses? A. Yes, sir.

Q. The extent of it, I mean?

A. The extent of the business at the warehouse?

Q. Yes. You are not a grain dealer.

A. As much so as a dealer.

Q. I ask you if you know generally; I do not mean particularly? A. Yes.

Q. What proportion of the grain handled by the warehouses is raised within what you call near Moss Landing?

A. I suppose about over one-tenth.

Q. Would it be over one-twentieth?

A. That would be a matter of guess work.

Q. Is it mere guess work? The large bulk of the grain comes by rail, does it not?

A. Since the railroad is built, yes.

Q. How long has the railroad been built?

A. About three or four years.

The Court. Q. What is the length of that Salinas Valley Railroad, or was it last year?

A. It extends from Salinas City to the town of Watsonville; it is twenty miles. Moss Landing is about half way between the two points, Salinas and Watsonville.

Q. Moss Landing is the terminus of the railroad, is it not?

A. No, sir; the road passes right along by Moss Landing, and goes to Salinas from Watsonville.

Q. How far is it from Watsonville to Salinas?

A. Twelve miles by the county road.

Q. By this road? A. Somewhat less.

Q. How far is it to Watsonville?

A. Twenty miles.

Q. From Moss Landing?

A. No, sir; from Salinas I do not know how far it is from Moss Landing to Watsonville. I have never been over the road but once, and then by rail. By the county road I have driven a great many times, and it is twenty miles. It is called twenty miles.

Mr. Fowle. Q. Moss Landing proper is not a ranch, is it? A. No, sir.

Q. No grain is raised there? A. No, sir.

John Cook, called for the defendants, sworn.

Mr. Treadwell. Q. You are one of the respondents in this suit? A. I am.

Q. A member of the firm of Moore, Ferguson & Co.?

A. Yes, sir.

Q. You were a member of that firm in October and November last? A. I was.

Q. Did you ever have a conversation with Mr. Cooper, or any other representative of the Pacific Coast Steamship Company, with regard to the main controversy in this action? A. I did.

Q. When, and with whom was the first of those conversations?

A. As near as I can recollect, it was on Friday, October 26th. After the transaction had been completed by Mr. Ferguson, of the purchase of the barley, I called on Mr. Cooper and asked him the question, if Mr. Ferguson had arranged with him to ship this particular lot of barley from Moss Landing to San Diego, to the Howard Commercial Company, and as the Howard Commercial Company was entitled to a $2.50 rate from San Francisco, the rate they were to charge us from Moss Landing to San Diego would be $3.10, and we would pay them the 60c. difference, and he said it had been arranged.

Q. Where did the conversation take place?

A. In Goodall, Perkins' office.

Q. Was there anything further at that conversation?

A. Nothing.

Q. When was your next conversation?

A. The second conversation was on the following day.

Q. Where was that?

A. That was in the same office.

Q. What was the conversation?

A. I told Mr. Cooper that we had received the re-

ceipt for the barley, and I asked him the question as to how we would settle with them for the difference. I also stated that there was a 25-cent storage charge on the receipt.

Q. Did you have that receipt with you at that time?

A. Not at that time, no, sir—and I suggested that the better way to settle the matter would be to give them a check for this amount. At the time I gave Mr. Cooper a credit memorandum on a blank piece of paper which was in the office, on the desk. I specified so many sacks of barley, and so many pounds, at 60 cents, covering the difference in tare, one item, and also another item of 25 cents, covering the storage, and gave them a written memorandum of the amount. The understanding was, when the barley would be shipped, that he would get a check for it, either by presenting his bill, or he would take a check to the office.

Q. What did Mr. Cooper say when you gave him that memorandum?

A. He had no objections at all.

Q. Anything further occur at that conversation?

A. Nothing.

Q. When was your next conversation?

A. The next conversation was when I brought him in the warehouse receipt.

Q. What day was that?

A. This was, I think, on Monday.

Q. Monday, October 29th?

A. Monday, October 29th.

Q. What was that conversation?

A. I handed him the receipt and did not discuss the

matter with him particularly, because we had talked the matter over thoroughly before, and I did not refer to it specially. I just handed him the warehouse receipt. By the way, I might say, when I presented the warehouse receipt I asked if he would not give me a shipping receipt for the barley then. He said no, that that part of the transaction would have to be consummated at Moss Landing, that the warehouse receipt would be forwarded to Moss Landing, and we would get our shipping receipt from there.

Q. I will ask you if this is the warehouse receipt to which you refer? (Handing.)

A. It is identical in substance. It contains the correct number of sacks of barley, and the correct number of pounds, according to the memorandum that I gave Mr. Cooper.

You cannot positively identify the paper, I understand? A. No, sir.

Mr. Treadwell. Will counsel admit that this is the warehouse receipt in question?

Mr. Towle. Yes.

Mr. Treadwell. We offer the receipt in evidence. It reads as follows:

"No. 1023. Moss Landing, Monterey County, Cal.,
"Oct. 15th, 1894. Received t the Pacific Coast Steam-
"ship Company's Moss Landing warehouses, from J. R.
"Silveira, twenty-four hundred and forty-eight (2448)
"sacks of barley, weighing at Moss Landing 271,510
"pounds, for storage and shipment to San Francisco. at
"the rates, and subject to the conditions, on reverse side
"hereof: stored in warehouse No. 1, 280 sacks; No. 2,

" 1015 sacks; No. 3, 1153 sacks; 2448 sacks. Pacific " Coast Steamship Co., by S. N. Laughlin, Agent."

The endorsements on the back are so long that I suppose counsel will waive my reading them. The material portions are these: " Rates and conditions"—

Mr. Towle. If you read any, you should read all.

Mr. Treadwell. Very well, I will read all. I simply did not want to take up time.

" Rates and Conditions.

" The within mentioned goods are received, subject to the following Rates and Conditions:

Rates for 2,000 Lbs.

" Storage for the first month or fraction of month after Oct. 12, 1894 . . . . . 25c.

" For each additional month or fraction of a month 25c.

" But not to exceed for the season ending July 1st, 1895 . . . . . 75c.

" For transportation to San Francisco, via Pacific Coast S. S. Co.'s Vessels, including Wharfage, Loading, Handling, Weighing, etc., at Moss Landing, as follows:

" Wheat, Barley, Corn, Oats, Potatoes, Beans, Peas, Flax Seed, Mustard Seed, Onions, Bird Seed, Corn Meal, Cracked Corn, Rye Meal, Ground Barley, Middlings, and Malt $3.50

" It is expressly understood that the Pacific Coast " Steamship Co. or any connecting company, or any " one interested in or employed by such companies, shall " not be held responsible, or liable for any loss or dam-

"age resulting from any of the following causes, viz: "The elements, perils of the seas, dangers of navigation, surfing, fire, storms, earthquakes, shrinkage, "handling and vermin, or any other causes beyond the "control of the company or companies. Connecting "companies not responsible for loss, or damage, except- "ing on their own line.

"While the goods are in the warehouse, the company "shall be liable only as warehousemen, and not as carriers.

"Goods may be withdrawn from warehouse for local "use or consumption on payment of accrued storage and "endorsement of and surrender of warehouse receipt.

"Goods to be stowed on deck or below deck, at option of master.

"*Important Notice.*—The law makes it a felony, and "imposes a penalty of $5,000 for shipping goods without the order of the owner endorsed on the warehouse "receipt, and the surrender of the receipt. Therefore, "when you want the within mentioned article shipped, "fill out in ink the following order, and send it to the "warehouse."

The receipt is endorsed, "J. R. Silveira, shipped by "steamer 'Bonita,' Nov. 2, 1894."

(*The paper is marked "Respondent's Exhibit A."*)

Q. When was your next conversation?

A. I cannot recall that date. It was subsequent to the shipment of the barley from Moss Landing to San Diego.

Q. How did you come to have it? That will fix it, perhaps? A. I do not understand the question.

Q. How did you come to have that conversation? Was it at your suggestion or at Mr. Cooper's?

A. I called on Mr. Cooper.

Q. State what occurred.

A. This was the interview I had with Mr. Cooper subsequent to the delivery to him of the warehouse receipt.

Q. What was it?

A. I called on him. They had not presented their bill in the mean time for this difference of 85c. per ton, and as the Howard Commercial Company were entitled to a $2.50 rate on all the shipments which we were forwarding from San Francisco to them at San Diego, I did not wish this 85c. to go forward on the Howard freight bill as a back charge, because it would complicate our accounts to some extent, and require a crediting process, which I wished to avoid. I requested Mr. Cooper to telegraph his agent at San Diego to deliver this grain to the Howard Commercial Company, collecting of him the rate which he was entitled to from San Francisco, $2.50 per ton, and we would pay him the difference of 85c. This was late in the afternoon.

Q. When you say late in the afternoon, about what hour?

A. I should judge possibly half-past five o'clock.

Q. Very well; proceed.

A. He then started the subject of back charges, the first reference which we had to them. I told him—

Q. What did he say?

A. He said there might be some back charges on that grain that he did not know the amount of. I said to

him, that he knew precisely what the back charges were, because he had obtained a negotiable warehouse receipt from Waterman & Co., and the amount the warehouse had earned up to that time according to the specifications in the receipt, was 25c. per ton.

Mr. Cooper's reply to me was, that he had not examined the warehouse receipt, and consequently was not in a position to know what those charges were. My reply to him was, I had examined it very carefully, because we had paid for the grain, and was very careful to scrutinize it and see the amount of the charges which the warehouse receipt covered were deducted before we made our payment.

Q. Anything further?

A. Then he referred to the subject of possibility of freight from Blanco.

Q. What did he say about that?

A. He said there might be some freight on that grain from Blanco. My reply to him was, if there was any back freight against that particular lot of grain, it would be so specified on the warehouse receipt, because the warehouse receipt was a negotiable instrument received by bankers here as collaterals, and would be received by any concern that was advancing money on property of that kind, and if there were back charges it would be specified on the warehouse receipt, in order to constitute a lien against the grain.

Q. Anything further? Go on and state everything that occurred at that conversation.

A. We discussed the matter pro and con, he maintaining his position that there might be a freight charge,

and I claiming that it could not be possible under the existing circumstances, according to the terms of the warehouse receipt, and he agreed to telegraph his agent at San Diego, and we would pay him the difference of 85c. per ton.

Q. Anything further at that conversation?

A. I might say that that telegram he agreed to send the following morning. He said it was late in the day, and he would defer sending it until the following day.

Q. Was the telegram prepared at that time?

A. I am not in a position to say.

Q. Was that all of that conversation?

A. That was all.

Q. Was any other person present at that conversation besides yourself and Mr. Cooper?

A. Not that I remember.

Q. Did you notice the presence of Mr. H. W. Goodall at that time? A. No, sir.

Q. You did not have any conversation with him?

A. None at all. Mr. Cooper is the only man I interviewed concerning the transaction.

Q. Did you have any further conversation with Mr. Cooper or any one else belonging to the Pacific Coast Steamship Company, on that subject?

A. None, as far as I recollect.

Q. Did you ever make any payment, or offer of payment, to the Pacific Coast Steamship Company on this account? A. We did.

Q. When was that?

A. We made them an offer of payment on November 16th, 1895.

Q. How was that done?

A. There was a statement made in the transactions accompanied by our check, signed by myself, and forwarded by our clerk to the office of the Pacific Coast Steamship Company.

Q. Was the statement in writing?

A. The statement is in writing.

Q. Please produce the statement?

A. Here it is. (Handing.)

Mr. Treadwell. Will counsel admit that this statement and check was presented on that date to the Pacific Coast Steamship Company, and the acceptance of the check refused?

Mr. Towle. Yes; if the witness states so. It was refused because it was not the amount due.

Mr. Treadwell. Certainly.

Mr. Towle. It was refused in settlement of their demand.

Mr. Treadwell. I suppose that is a fact. (Reading.)

" San Francisco, Nov. 16, 1894.

" Mess. Goodall, Perkins & Co.

" Bought of Moore, Ferguson & Co.

" Grain, Flour and Wool Commission Merchants,

" Agents California, Walla Walla and Oregon

" Flouring Mills,

" No. 310 California Street.

" Terms—Credit Memo.

" 2,448 sks. Barley, 271,510, at 85c. per ton, $115.35

" 2d June, Moss Landing to San Diego, $3.10.
" " San Francisco to " " 2.50.

.60
" Storage on Barley in W'hse, .25

" Difference due G. P. & Co., .85
" Adjustment on 2,558 sks Barley shipped
" from Moss Ldg. to Howard Com. Co.,
" San Diego, in Oct., '94."

The check accompanying it is a check of Moore, Ferguson & Co., on the Sather Banking Company, in favor of Goodall, Perkins & Co., for $115.39.

(*The paper is marked Respondent's Exhibit "B."*

Q. At any time during these transactions did you know where this barley came from? A. No, sir.

Q. When did you first hear where it did come from, or hear anything about it?

A. It was when Mr. Cooper made the remark that there might be back charges on it from Blanco.

Q. That was at the conversation at which the telegram was arranged? A. Yes, sir.

Q. And at that time the grain had already gone forward from Moss Landing to San Diego?

A. It had, because I had forwarded the receipt.

Q. Did you ever, at any time prior to that, have any information that there was, or might be, any railroad charges, or freight charges on this barley?

A. None whatever.

Q. Did you at that time know, or had you ever heard, anything of the relations between the Pacific

Coast Steamship Company and the Salinas Valley Railroad Company? A. I never had.

Cross-Examination.

Mr. Toole. Q. When was this conversation to which you referred, with reference to the time when the telegram was sent by Goodall Perkins to their agent at San Diego?

A. As near as I can recollect, it was on Saturday.

Q. This conversation was on Saturday?

A. Yes, sir.

Q. The telegram was sent the following Monday.

A. I have no knowledge of when the telegram was sent. Mr. Cooper made the remark that it was late in the day, and he would defer sending the telegram until the morning. I think that was the language he used.

Q. When was the telegram written?

A. I cannot answer that question.

Q. Did you not see it when it was written out?

A I did not.

Q. Are you certain about that?

A. I am decidedly so.

Q. This conversation on the Saturday was the final conversation between you and Mr. Cooper, as you remember it, relating to the way in which freight charge should be handled, was it?

A. It was the final conversation, so far as I can recollect it now.

Q. Whatever was done at that conversation was the final result of all the conversations which had taken

place, including this conversation? That was the final understanding between the parties?

Mr. Treadwell. Objected to as calling for a conclusion.

Mr. Towle. Q. As you understood it. Did you so understand it, that this conversation on the Saturday afternoon, between yourself and Mr. Cooper, included the terms of this shipment?

A. There was no reference made to any prior conversation that we had.

Q. Did you understand that the matter was definitely settled on that afternoon? A. I did.

Q. You say that on that afternoon Mr. Cooper did refer to the facts that there might be other charges than the warehouse charges—these railroad charges?

A. Back charges he specified first.

Q. You say he spoke of Blanco. Are you familiar with that country down there? A. No, sir.

Q. Did you understand that Blanco meant a railroad charge?

A. That was the intimation from his remark.

Q. That was what you understood by it, was it not?

A. Yes, sir.

Q. That Mr. Cooper then informed you that there might be back railroad charges on this freight?

A. Yes, sir.

Q. That is what he meant to convey?

A. That is what he meant to convey in the latter part of his conversation.

Q. And that is what you understood?

A. Yes, sir.

Q. And then insisted that there could not be any such charges? A. I did.

Q. He, on the other hand, maintained his position that he was fearful there was such a charge?

A. Yes, sir, he said there was a possibility of it.

Q. Yet you say that in the face of that he agreed to waive that possibility?

A. He agreed to wire his agent at San Diego to collect freight of Howard at the rate of $2.50 per ton, and we were to pay him the difference which amounted to 85c.

Q. Was there an express statement of 85c. from him?

A. I stated that expressly to him.

Q. Did he agree to that? A. He did.

Q. Did he not say that he would send a wire to San Diego to collect $2.50; to deliver on payment of $2.50, and you then should pay the difference, whatever it might be? A. No, sir.

Q. Was not that his proposition?

A. I do not know what his proposition was. I know what he stated.

Q. What argument did you use to induce him to recede from his position, that there might be other charges than those you stated?

A. As I have already stated, I claimed that was a negotiable warehouse receipt issued by their own company, accepted by all grain dealers, and that if there were any back charges at all that constituted a lien against that grain, which would be so specified on the receipt.

Q. Is it not true that you, trusting to your construction of that contract, were willing to take the chances on whether there would be back charges on that or not, and you said, 'All right, ship it, and we will pay the difference?'

A. The 85c.

Q. Without saying the 85c.?

A. Yes, sir; I specified 85c.

Q. Is it not true that you, relying on your construction of that negotiable receipt, as you term it, said to yourself, "It does not make any difference whether there are or not, they cannot collect from me, and I will pay the back charges?'

A. Not necessarily,

Q. And Mr. Cooper did not agree to accept the 85c, Were you not induced to agree that it should go forward on the general order standing, because of your reliance on your construction of the receipt?

A. No, sir. I had discussed the subject thoroughly with Mr. Cooper prior to this time, giving him a written memorandum of what we pledged to pay, and I did not depart from that understanding at all.

Q. When was that memorandum given?

A. That was at the second interview.

Q. That was on the 27th of October?

A. I think that was on the 27th.

Q. In what shape was that memorandum?

A. In the Pacific Coast Steamship Company's Office they have blanks of figuring paper on the desk, possibly a little larger than that. (Pointing). I had this memorandum at the time I gave Mr. Cooper the figures, be-

cause it was an unsettled transaction, and I was attending, to a large extent, to the outside business. We were shipping to Howard largely at that time, and I took a blank—this pad that was on the desk—and wrote out an itemized statement of this credit, and handed it to Mr. Cooper personally.

Q. That was a mere statement of what you understood the situation to be, was it not?

A. Yes, sir; and what he understood it to be, according to our conversation?

Q. You did not understand, then, that he accepted that as a true statement of the situation?

A. I did.

Q. Did he express himself?

A. He did not express himself one way or another. He did not object to it.

Q. He simply took what you tendered him as your figures?

A. Yes, sir; I told him that is what we would have to pay them

Q. He did not accept them as the limit of liability in this matter?

A. He accepted our statement. We did not discuss the matter thoroughly. I presume that, being familiar with the transaction in all its details, if my figures to him were incorrect in any way—

Q. What I am getting at is this: There was no express understanding between you and Mr. Cooper at that time, that he would forward this grain, collecting $2.50 below, on your payment to him of that amount?

A. There was a distinct understanding.

Q. On this day in October?

A. On this day in October.

Q. How did this matter come up in the shape it did on this subsequent day in November, this Saturday afternoon?

A. You ask me if I can account for it?

Mr. Treadwell. We object to the question, because the witness has not testified to any such conversation in November.

Mr. Fowle. Whatever the date is.

The Court. October 26th and 27th.

Mr. Towle. Was Saturday the 27th.

Mr. Treadwell. Yes.

A. Please state the question again.

Mr. Towle. Q. If this arrangement was definitely made at the time you stated, how did it happen that the matter was opened up again by this conversation relating to it on the Saturday afternoon?

A. Mr. Cooper opened the matter personally. The way I account for it is this. At the time he made his arrangements with us it did not occur to him there was any railroad charges against this grain that was to be shipped south. In his language to me he did not give the slightest intimation of any such possibility. When the grain was about reaching its destination, and I requested him to telegraph his agent at San Diego to collect the $2.50 from Howard, it occurred to me that that dollar credit was brought to his recollection, and it was an error of his own, and he wanted to push it off on us.

Q. This was on the 27th. Why did you not say to

him in that conversation, "This has all been determined?"

A. I did not say that in so many words, but the attitude which I assumed towards him and my conversation with him determined that.

Q. You did not say to him, "This matter has been arranged before," did you?

A. I do not think I repeated those words.

Q. Or anything equivalent to them?

A. Or anything equivalent to them.

Q. Whereabouts in the office on this Saturday afternoon did this conversation take place?

A. In Goodall Perkins' office,

Q. In the outer office?

A. In the main office, close to Mr. Cooper's desk, The office at that time was differently arranged to what it is now.

Q. What time in the afternoon was it?

A. I should judge it was about half-past five. It was towards evening.

Q. On Saturday afternoon? Is that office open on Saturday afternoon at half-past five, to your knowledge?

A. Whether this was Saturday afternoon or not. I am not certain in my own mind. I know this last conversation took place between Mr. Cooper and myself in the afternoon late. The remark that Mr. Cooper made concerning the telegram, was that on account of the lateness of the hour, he would not send the wire until the morning. If I recollect correctly, there must have been a holiday about that time.

Q. If Saturday was the 27th. and this was on the

27th, I suppose it was Saturday afternoon, and it was a sort of a holiday in the office when you got there; that is, most of the people had left.

A. Mr. Cooper was there. He was the only gentleman I had any desire to confer with.

Q. Did you see any one else standing there?

A. I cannot recollect that I did.

Q. Do you say that no one else was near?

A. I cannot tell that.

Q. You would not deny that some one else was there? You heard Mr. Goodall's testimony? A. Yes, sir.

Q. You would not say he was not there?

A. I would not deny that Mr. Goodall was there, but I cannot testify that I saw him there at that time.

Q. You was not concerned whether some one was there or not? A. No, sir.

Re-direct Examination.

Mr. Treadwell. Q. I should like to have you refresh your recollection as to the date of that conversation concerning that telegram. How much time had lapsed from the beginning of this transaction up to the time that that last conversation was had?

A. It was quite a number of days, as near as I can recollect, for the reason that there was some delay in the forwarding of the grain.

Q. That is what I supposed.

A. It did not go forward as quick as Goodall, Perkins had anticipated it would go, or we either.

Q. Then this conversation could not have occurred on October 27th, could it?

A. I don't think it could.

Q. May it not have been as Mr. Goodall states it, to have occurred on November 3rd, the Saturday following?

A. I think it quite possible when I recall the fact that there were several days intervening on on account of the grain not going forward promptly.

Further Cross-Examination.

Mr. Towle. Q. You think, then, this last conversation was on November 3rd, do you?

A. My opinion is that it was quite a number of days after I had delivered to Mr. Cooper the warehouse receipt.

Q. That had direct reference, did it not, to procuring a telegram to be sent to deliver this grain on payment of $2.50 a ton?

A. That conversation had; yes, sir.

Q. That is what you want to get at that time?

A. Yes, sir.

Q. That conversation brought up the exact condition on which such a telegram would be sent, did it not?

A. Yes, sir.

Q. And then it was that Mr. Cooper stated that those back charges might exist?

A. Yes, sir.

Q. Then it was that it was arranged that a telegram should be sent with the understanding that the balance of freight should be paid here?

A. The balance of the freight, together with the storage.

Q. And then it was in connection with that, that the discussion arose as to the probability of railroad charges, in addition to the freight charges and storage, about which the understanding arrived at, the difference existed between you and Mr. Cooper?

A. As I have already stated, Mr. Cooper insisted that there might be back charges first. Then, when I explained to him about the warehouse receipt carrying the charges, he mentioned the freight proposition.

Q. The conversation grew out of the fact that there came a definite request for instructions from the office here to the San Diego agent to deliver, on receipt of $2.50 a ton? A. Yes, sir.

Q. And as the result of that conversation, whatever it may have been, the authorization was sent from this office to deliver on payment of $2.50 a ton. Up to that time you had had no such instructions issued by this office?

A. I do not exactly understand your question.

Q. Up to that time there had been no instructions issued? You had procured no instructions from Goodall, Perkins & Co., to deliver that grain on receipt of $2.50 per ton, at San Diego?

A. Yes, sir; that was in harmony with our previous arrangements.

Q. I say, up to that time you had procured from them no instructions to their agent in San Diego?

A. None that I am aware of.

Mr. Treadwell.—Q. Had you prior to that conversation learned anything about it? A. None.

Q. Had you heard anything about how they had billed it? A. Nothing in any way whatsoever.

Mr. Treadwell. Will counsel admit that, with the filing of their answer in this case, the respondents deposited in the registry of the Court, in pursuance of their answer, the sum of $115.39?

Mr. Towle. I do not know anything about it. I presume they did. Yes, they did.

Mr. Treadwell. We rest.

G. H. Cooper. Recalled in rebuttal.

Mr. Towle.—Q. You were asked yesterday on cross-examination as to whether there were any entries in the office of the Steamship Company relating to this shipment, and showing this charge of $1 per ton. You said you knew of none. Have you since examined with reference to that? A. I have.

Q. Do you find such entries?

A. I find some; yes, sir.

Q. You were also asked whether there was, in the records of the office here, any evidence that a similar charge had been made on similar shipments?

A. Yes, sir.

Q. Shipments of this character, outside of this one?

Mr. Treadwell. The question we asked was ,"On any prior occasion."

Mr. Towle.—Q. Have you examined with reference to that? A. Yes, sir.

Q. Have you found any such entries?

A. Yes, sir.

Q. Have you here the evidence of it?

A. Yes, sir.

Q. Is it in these books produced (pointing)?

A. In those books? yes, sir.

Q. Be kind enough to look at these. In this paper entitled "Manifest of Cargo from San Francisco to Moss Landing to San Diego, per steamship 'Bonita,' Captain R. W. Anderson, purser, J. J. Carroll, September 20, 1894," one of the records to which you have referred?

A. Yes, sir.

Mr. Towle. The item referred to is under the head of "Shipper. Wahailich, Cornett Co. Consignee, N. C. Nason & Co. From Blanco ex P. V. R. R., 500 sacks of potatoes. Weight, 58,720 lbs. Rate, $4.10. Freight, $120.38; 29–4/10 tons. P. V. R. R. 58,720 lbs., at $1, advance charges, $29.36."

Q. Have you here the manifest of the steamer "Bonita" of this date? A. I have.

Q. Is this the manifest (producing)?

A. That is the manifest.

Mr. Towle. The paper is entitled "Manifest of cargo, November 2, 1894, from San Francisco to Moss Landing, to San Diego, per steamship 'Bonita,' Captain P. Doran, Purser, J. J. Carroll. Shipper, Moore, Ferguson & Co. Consignee, Howard Commercial Company. From Blanco ex P. V. R. R., marks 96. Packages, 2448 sacks of barley. Weight, 271,510 lbs. Rate, $4.35. Freight, $590.53. Total, $590.53. 135–8/10 tons. P. V. R. R. 271,510 lbs., at $1, $135.76. S. D. 1/8 of $454.77."

The next item is: "Shipper, Brown & Laurence. Consignee, Nason & Co. Mark 8. 271 sacks spuds. 33,800 lbs. Double cross. 201 sacks spuds, 25,680 lbs. 256 sacks of spuds, 32,100 lbs. Total weight, 91,580

lbs. Rate, $4.10. Freight, $187.74. 45–8/10 tons. P. V. R. R., 91,580 lbs., at $1, $45.79. S. D. 1/8 of $141.95."

The next item on the same manifest is: "Shipper, S. N. Laughlin. Consignee, H. C. Treat & Co. Marks, 89. 200 sacks of wheat. Weight, 27,120 lbs. Rate, $4.10. Freight, $55.60. 13–6/10 tons. P. V. R. R., 27,120 lbs., at $1, $13.56. S. D. 1/8 of $420.40."

Q. Those are items referred to as representing similar shipments on which similar advance charges were collected? A. Yes, sir.

Q. Have you any entry in other books in the office showing the carrying of a credit of this $1 to the railroad?

A. Yes, sir.

Q. Will you turn to those?

Mr. Treadwell. Do you refer to the particular items that you have just been reading?

Mr. Towle. Yes.

Mr. Treadwell. This is not necessary. We will admit that it was carried to the credit of the railroad company in other books.

Mr. Towle. But contemporaneously.

Mr. Treadwell. Contemporaneously with those papers —contemporaneously with the transaction?

Mr. Towle. Yes.

Mr. Treadwell. Go on. I do not see what difference it makes.

A. Here is a credit of the particular shipment in question to the railroad company.

Mr. Towle. The entry which I offer in evidence now is on page 233 of freight book 90: "Pacific Coast Steam-

ship Company. Freight on cargo steamship 'Bonita', voyage 419. From San Francisco to San Diego and way ports and return. Sailed from San Francisco November 1st, 1894. Arrived in San Francisco November 9th, 1894. Entire charges on shipment. $590.53. From Blanco to San Diego. Credit P. V. R. R. 27,510 at $1, $135.76."

Q. Is there any entry relating to this?

A. Yes, sir.

Q. Will you look at page 18 of a book entitled "Records of general bills for collection 2, Pacific Coast Steamship Company," and see whether upon that page you find another entry relative to the charge against Moore, Ferguson & Co. in this matter?

A. Yes, sir; I find such an entry.

Mr. Towle. We offer this entry in evidence.

Mr. Treadwell. I object to it as incompetent. They seek to show that they have charged us in their books what they are suing us for now. It is their declaration merely.

Mr. Towle. Counsel asked the other day if we had any such entry. We now offer it.

Mr. Treadwell. I asked if they had on their books any occasion on which such a charge had been made, and he said he would look at the books and see.

The Court. I do not remember what your demand was. Its only materiality would be to show that it was the same character of charge made in the other case.

Mr. Treadwell. We do not care anything about it, because it does not amount to anything when it goes in.

The Court. I will let it go in then. It does not add to their evidence.

Mr. Towle. We will read the entry: "General bills of collection for the month of November;" the year is not stated.

Mr. Treadwell. It is evidently 1894.

Mr. Towle. 1894. "Date of billing, November 5th, 1894. No. 8. Against whom. Moore, Ferguson & Co. For what, freight on barley. Amount of bill, $251.15. To whom rendered, M. F. & Co. Date. November 13th. Approved voucher. Amount, $251.15."

Q. Have you with you the paper which formed the basis of that entry? A. Yes, sir (Handing).

Q. Is this it which you produce?

A. Yes, sir.

Mr. Towle. I offer this paper in evidence.

Mr. Treadwell. Objected as irrelevant, immaterial and incompetent. This is their own paper, made up by themselves with which we have nothing to do. I do not think the record ought to be filled up with these things.

The Court. The objection is sustained.

Mr. Towle. I do know that the Court knows what it is yet. It is a part of the transaction, and is directly connected with the telegram. If the telegram was admissible as evidence this directly refers to it, and it seems to me this also ought to be, because it shows what action was taken on this telegram.

The Court. This is a different matter from the books.

Mr. Towle. This is a report substantially, if the Court will look at it without it being offered in evidence.

Mr. Treadwell. Our objection is, it is transaction between themselves and not connected with us. It is their declaration.

The Court. I do not think it is admissible. I do not understand that it is, on any rule of evidence that I am familiar with.

Mr. Towle. Mr. Cooper, is it or not customary in stating the rates of freight on the manifest to mention there specifically the back charges?

Mr. Treadwell. Objected to as incompetent and irrelevant. The custom of these parties cannot bind the respondents.

The Court. No, but here is the point. You have called for the books, and he produced the books in which there are these charges. They are to be compared with the charge in this case. I do not know but what they are entitled now to explain, those books being in, whether or not those entries or charges are customary or not.

Mr. Treadwell. If that is all the question means, we have no objection to it. I did not understand the question that way.

Mr. Towle. My question is, in making their charges for freight on the manifest, whether or not it is customary to specify separately advance charges, or whether it is all put in as a freight charge?

A. Do you mean from Blanco?

Q. Yes. Blanco, or anywhere? Where there are advance charges for transportation, before it comes into the possession of the Pacific Coast Steamship Company, and they forward it, do they render a bill for the whole amount, including the transportation, or do they specify separately the advance charges?

A. They specify separately the advance charges when they have been advanced at the time, and paid over when

it is not a through rate—been actually advanced and paid over at the time.

Q. Where it had not been, then what?

A. Where it has not been paid over from Blanco it is customrry to make the bill showing the rate right from the original point of shipment to the destination.

Q. It is made on the manifest on the shipment from Blanco, for instance, to ultimate destination?

A. Yes, sir.

Q. And not from Moss Landing?

A. Either from Blanco via Moss Landing, or to Moss Landing from Blanco.

Q. So that the manifest in a shipment of that character would not show the extent of the charge from Blanco, for instance, to Moss Landing? A. No, sir.

Q. It would all go in as the freight rate from Blanco to San Diego? A. Yes, sir.

Q. The adjustment as between the Steamship Company and the Railroad Company would come afterwards?

A. Yes, sir.

Cross-Examination.

Mr. Treadwell.—Q. Mr. Cooper, referring to the manifest of cargo, steamship "Bonita," September 20th, 1894, referred to by you, do you know who wrote that paper?

A. Do you mean the manifest itself?

Q. The paper itself, just as it is here; as you have produced it?

A. Mr. Carroll, the purser of the steamer.

Q. Where was that written, if you know?

A. Probably between Moss Landing and the point of destination.

Q. When and how did that reach your office in San Francisco?

A. Turned into our office by the purser on his return to port, San Francisco.

Q. Is the whole of that page, and the whole of the entry read, in Mr. Carroll's handwriting?

A. No, sir.

Q. What portion of it is not in Mr. Carroll's handwriting?

A. The blue pencil notation memorandum.

Q. That is not in Mr. Carroll's handwriting?

A. No, sir.

Q. The blue pencil is as follows: "PV. R. R., 58,720, at $1, equals $29.36." Then there is one below there which appears not to refer to that item? Who wrote that blue pencil memorandum?

A. that was written by a clerk in our office, at the time.

Q. Do you know when?

A. When he was making the division of that rate subsequent to the return of the manifest to the office, prior to the settlement with the railroad company.

Q. That, then, simply a memorandum of a subsequent settlement with the railroad company, and is not a part of the original manifest?

A. The notations were not there when the manifest was returned to our office by the purser.

Q. Do you know anything of that item yourself, beyond what you see on this book?

A. I know that item is correct, that it was paid.

Q. Did you ever see those potatoes? A. Never.

Q. Do you know that they were shipped, except from this manifest?

A. I am referring to the blue pencil memorandum.

Q. I do not refer to that. I'am referring to the item itself, on the 271 sacks of potatoes. Do you know anything about the shipment yourself?

A. I know nothing about it. I never saw the shipment.

Q. You do not know, in fact, there ever was such a shipment, do you, except from this manifest?

A. Except for that record and the receipt of our agent for the potatoes at San Diego.

Q. I simply mean, you personally know nothing about it? A. No, sir.

Q. Do you know in any way how those potatoes were shipped? A. Will you define that question?

Q. When they were shipped from Blanco, do you know where they were consigned to?

A. I have that record to go by.

Q. From that record you infer that they were shipped to where from Blanco?

A. They were shipped by the Railroad Company to Moss Landing

Q. From that record? A. Yes, sir.

Q. Please show what there is on the record to imply that? A. From Blanco ex Pajaro Valley Railroad.

Q. You know as a fact that the railroad does not come any further than Moss Landing, but do you know where those goods were consigned to from Blanco?

A. I presume to Moss Landing. I think they were

consigned right to San Diego, there being no storage on the shipment.

Q. Have you the same to say with regard to the blue pencil memorandum on the other manifest?

A. Yes, sir.

Q. There is nothing on the original manifest to show what the railroad freight in any case is, on this manifest of the steamer "Bonita," of November 2nd, 1894?

A. Nothing to show to the uninitiated.

Q. Is there anything in the manifest itself to show what the railroad freight is? A. There is to me, yes.

Q. What is it?

A. The fact that the rate is $4.35.

Q. How does that indicate it?

A. I know what are local charge is.

Q. I do not ask you that. From this manifest alone can you determine that?

A. I know the division of the rate.

Q. I do not ask you what you know outside. Is there anything on that manifest which shows what the railroad freight is?

A. It does not state specifically there, except with the blue pencil memorandum. Leaving that aside, it does not state specifically the railroad company's proposition.

Q. In these two cases, consignments to Nason & Co. of various sacks of spuds, and to H. C. Treat & Co. of some sacks of wheat, in both of these cases they purport to have been shipped from Moss Landing, do they not, to San Diego?

A. In one case from Morocojo, and in the other case from Salinas.

Q. Does not that manifest show that they were shipped from Moss Landing to San Diego?

A. One line reads from Moss Landing to San Diego, and the one below from Morocojo ex Pajaro Railroad.

Q. That is not to San Diego? It does not say to San Diego?

A. It might be considered part of the same item, Moss Landing ex Morocojo to San Diego. That is practically what it means.

Q. In either of these cases do you know anything about those shipments personally?

A. In what respect?

Q. Do you know anything about them personally?

A. I never saw the potatoes.

Q. Do you know they were, in fact, shipped except through this record?

A. Except from that record and our agent's receipt for them.

Q. Do you know from this record, or any other sources, whether in either case they were stored in the warehouse at Moss Landing?

A. I judge not from the fact that there is no provision with the exception of the first shipment.

Q. I am not referring to that, but to the other two.

A I judge they were not stored there, as there is no provision for storage charged. The rate does not include storage.

Q. The first line of that manifest is the one in controversy in this suit, is it not? A. Yes, sir.

The Court.—Q. In blue pencil I find this memoran-

dum: "Look out for storage credit." What does that mean?

A. That means that 25c. of that is to be credited to Moss Landing storage.

Q. When was that memorandum made in blue pencil?

A. On the apportionment being made on the return of the statement prior to entering it in this book (pointing).

Q. What is the meaning of "S. D."?

A. San Diego.

Q. "1/8 of 4457?"

A. The proportion that we allow the San Diego wharf for wharfage. Our rate includes wharfage.

Q. You own the wharf? A. Yes, sir.

Q. There is a heading here on the manifest, printed in the body, "Advance charges". What is that for? What do you enter in that blank?

A. We enter where the purser actually pays our advance charges to a connecting line.

Q. Where the purser pays?

A. Yes, sir; where it is actually paid over.

Q. Where it is not actually paid over, it is not entered in that? A. No, sir.

Mr. Treadwell. Your honor referred to a pencil memorandum, which you read. On which item was that memorandum?

The Court. The one involved in this case.

Redirect Examination.

Mr. Towle. Q. The custom, so far as these manifests,

is that on the return of the steamer they are turned in to the office? A. Yes, sir.

Q. In the ordinary routine of the office, they are taken up, and the apportionment made? A. Yes, sir.

Q. These pencil memoranda are a part of that apportionment? A. Yes, sir.

Q. It is done in the ordinary routine work of the office? A. Yes, sir.

Q. You heard the testimony of Mr. Cook with reference to your agreeing to accept 85c. in full of all transportation and warehouse charges on this grain, and the surplus of freight 85c. in excess of $2.50? You heard his testimony on that? A. Yes, sir.

Q. Did you ever agree to that proposition?

Mr. Treadwell. I object to the question, as that calls for a conclusion. The witness can state what occurred.

Mr. Towle. I have a right to ask whether he agreed to any such proposition.

The Court. I think the better way is to ask what he said. Did he make any statement about the 60c. and the 25c.?

A. No, sir. I never heard any such statement to my knowledge.

Q. You heard what he said about that?

A. Yes, sir.

Q. Is it true or false?

A. It is absolutely false, Mr. Cook's testimony, for the most part.

Mr. Towle.—Q. Did you, or not, ever agree to accept a specific sum from Moore, Ferguson & Co., in excess of the $2.20?

Mr. Treadwell. I object to the question as calling for a conclusion. Let him state what he did or said.

The Court. It seems to me to be open to that objection.

Mr. Towle.—Q. Supposing that Mr. Cook did make the statement, which you say he did, that they would pay 85c. in addition to the $2.50, did you reply to that that would be satisfactory to you, or anything of that character?

A. No, sir.

The Court.—Q. Did you, by your silence, give consent?

A. No, sir. I do not remember any such statement or any such proposition on the part of Mr. Cook—any specified amount mentioned.

Mr. Towle.—Q. When was the last conversation with him, as near as you remember?

A. November 6th.

Q. Was that the day that the telegram was sent?

A. Yes, sir?

Q. Was he there at the time that telegram was written?

A. Yes, sir.

Q. Was it submitted to him? A. It was.

Q. And satisfactory to him? A. It was.

Q. You heard the testimony of Mr. Ferguson with reference to you agreeing to give that special rate by telephone. Have you any recollection of doing such a thing as that?

A. My recollection is, in my conversation with Mr. Ferguson I said I thought there would be no objection to our delivering the grain at $2.50, and collecting the balance of charges here from him—from his company here. The final arrangements were made with Mr. Cook.

Q. Had any final arrangement been reached by telephone with Mr. Ferguson?

Mr. Treadwell. Objected to as calling for a conclusion.

Mr. Toole.—Q. Did you understand that any final arrangement had been reached with Mr. Ferguson by telephone?

Mr. Treadwell. Objected to as calling for a conclusion, and as not being in rebuttal.

The Court.—Q. You are calling for the conclusion of the transaction?

Mr. Toole. Yes, sir.

The Court. That is a fact. He is not calling for the agreement, but for the time the last part of the transaction was concluded.

Mr. Treadwell. I beg Your Honor's pardon. The question was "on a particular occasion, did you understand that was the final conclusion of the whole thing?" I think that is improper, and calls for his understanding.

Mr. Toole. I have a right to his understanding. He is one of the parties.

The Court. I overrule the objection.

Mr. Toole.—Q. Did you understand that any final arrangement had been reached with Mr. Ferguson by telephone?

A. Not as to the proposition that we were to deliver the barley at less than the ordinary rate.

Q. Now, Mr. Cooper, when, in your mind, was the question of the delivery of this grain at $2.50 at San Diego, finally and definitely settled? At what date?

Mr. Treadwell. Objected to as immaterial. Let him state the facts.

The Court. I think that was what he was calling for. That is the way I should construe it, anyhow.

A. November 6th.

Mr. Towle.—Q. That is the date when the telegram was sent? A. Yes, sir.

The Court.—Q. This had been shipped on November 2nd. A. Yes, sir.

Mr. Towle.—Q. Do you remember of any discussion relating to the warehouse receipt and what was shown upon that by Mr. Cook? You heard him testify with reference to that?

A. My recollection of that is that Mr. Cook brought the warehouse receipt to our office and handed it over to me, and I simply took it and took it in the inner office, and the letter was written to our agent on the same date, October 27th, enclosing that receipt.

Q. Do you recollect any discussion between Mr. Cook and yourself with reference to what appeared on that warehouse receipt as charges against this grain?

A. Yes, sir.

Q. You heard him testify that that matter was discussed?

A. I remember him saying something about there being a 25c. storage charge.

Q. Do you remember anything as to the discussion relative to other charges as stated by Mr. Cook?

A. Do you mean with reference to the possible railroad charges? Q. Yes.

Q. Had any final arrangement been reached by telephone with Mr. Ferguson?

Mr. Treadwell. Objected to as calling for a conclusion.

Mr. Towle.—Q. Did you understand that any final arrangement had been reached with Mr. Ferguson by telephone?

Mr. Treadwell. Objected to as calling for a conclusion, and as not being in rebuttal.

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Mr. Towle. Yes, sir.

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A. Yes, sir.

Q. You heard him testify that that matter was discussed?

A. I remember him saying something about there being a 25c. storage charge.

Q. Do you remember anything as to the discussion relative to other charges as stated by Mr. Cook?

A. Do you mean with reference to the possible railroad charges? Q. Yes.

A. I remember stating that possibility to him on two occasions, very explicitly and definitely.

Q. Did you, in any conversation, recede from that?

A. No, sir. As to my answer about November 6th, perhaps I might explain that somewhat. I stated that November 6th was when I definitely understood it to be settled that the barley was to be delivered at $2.50. On November 3d, in the afternoon, I told Mr. Cook that if he would telephone us the number of sacks, and so forth, the data, on the following Monday morning, I would arrange to have such a telegram sent. It might have been considered settled at that time. Mr. Cook came down on the following Tuesday morning, and we re-opened the question; so November 6th was the date on which it was finally and definitely settled.

Q. Although on the Saturday previous to that you had agreed if he would come down on Monday you would fix up a telegram and send it?

A. Yes, sir; if he could give me a record of the number of sacks, that I could express the telegram intelligently, and we would explain it. He came down, and the question was re-opened.

The Court.—Q. You wrote a letter on October 27th?

A. Yes, sir.

Q. The warehouse receipt was delivered to you, and the letter was written by you, transmitting that receipt to your agent at Moss Landing, on October 27th?

A. Yes, sir.

Mr. Treadwell.—Q. To whom was that letter sent?

A. To our agent at Moss Landing.

Q. Will you examine and see if that is not the letter, or a copy of it? (Handing a letter to witness.)

A. No, sir; that is not the letter. That is a letter of a later date, referring to the warehouse receipt.

The Court.—Q. What is the date of that letter?

A. October 31st. Shall I read it?

The Court. Not unless it is called for.

Mr. Treadwell.—Q. That is a letter that was sent by you, is it?

A. I did not notice the signature. The signature is somewhat indistinct, but I think it is Mr. Edward Goodall's signature.

Mr. Treadwell. It appears to be. We will read this as part of the cross-examination.

"Oct 31st, 1894.

"Mr. S. N. Laughlin, Castroville, Calif.:

"Dear Sir:—The other day we sent you a Ware-
"house Receipt, No. 1023, for 2448 sacks of barley,
"Marked '96,' delivered to us by Moore, Ferguson &
"Co. of this city, the same to be shipped to San Diego
"by the Bonita next Friday morning. When you make
"this shipment please forward to Messrs. Moore, Fergu-
"son & Co. of this city the company's regular shipping
"receipt to cover, and oblige

"Yours truly,

"GOODALL, PERKINS & CO."

(Marked "Respondents' Exhibit 3.")

Mr. Towle. I have no further testimony.

Testimony closed.

[Endorsed]: Filed September 10th, 1895. Southard Hoffman, by J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY,
Libelant,
vs.
E. W. FERGUSON, ELIDA F. HOBSON and JOHN COOK, partners, doing business under the firm name of MOORE, FERGUSON & Co.,
Respondents.

No. 11,167.
IN ADMIRALTY.

Opinion.

Libel in personam to recover a balance of freight. Libel dismissed for want of jurisdiction.

GEO. W. TOWLE, JR., Esq., proctor for libelant. W. B. TREADWELL, Esq., appearing for MASTICK, BELCHER & MASTICK, proctor for respondents.

MORROW, DISTRICT JUDGE.

A libel in personam was filed in this case to recover a balance of freight alleged to be due for the transportation of 2,448 sacks of barley, weighing 271,510 pounds, on one of libelant's steamers, from Moss Landing to San Diego, both ports being within the State of California. The libel alleges that the rate of freights agreed upon was $4.35 per ton of 2,000 lbs., of which sum $2.50 per ton was to be paid by the Howard Commercial Co., of San Diego, the consignee of the barley; the balance of $1.85, including a charge of 25c. per ton for storage in libelant's warehouse at Moss Landing while awaiting transportation, was to be paid by Moore, Fer-

guson & Co., the shippers. It is further averred that the Howard Commercial Co., paid upon delivery of the barley, their agreed portion of the freight, viz.: $2.50 per ton, but that the respondents, Moore, Ferguson & Co., have refused at all times to pay the balance claimed to be owing, viz.: $1.85 per ton, aggregating the sum of $251.15, the amount sued for. The respondents, in their answer, confessed judgment to the amount of $115.39 being the amount of 85c. per ton, and deposited said sum in the registry of the Court, leaving a balance of $135.76 or $1.00 per ton, as the amount still in dispute.

The evidence in the case disclosed the fact that this charge of $1.00 per ton was the amount of the advance freight paid by the Pacific Coast Steamship Co. to the Pajarro Valley Railroad Co., for the transportation of the barley by rail from a place called Blanco in the interior of the State to Moss Landing on the coast, for shipment by vessel. This railroad part of the transportation was clearly not maritime and the contract, with respect thereto, not within the Admiralty jurisdiction. A contract, claim of service, to be cognizable in the admiralty, must be maritime in such a sense that it concerns rights and duties appertaining to commerce or navigation.

The Belfast, 7 Wall., 624, 637.

The service rendered must be martime in its nature.

The Hendrick Hudson, 3 Ben., 419; Fed. Cas., 6355.

A Raft of Cypress Logs, 1 Flip., 543; Fed. Case, 11,527.

Gurney v. *Crockett*, Abb. Adm., 490; Fed. Cas., 5874.

The John T. Moore, 3 Woods, 68; Fed. Cas., 7430.
The Murphy Tugs, 28 Fed. R., 429.
The Pulaski, 33 Fed. R., 383.

Whatever jurisdiction the Court may have had over the libel originally, by reason of the fact that the alleged contract related to transportation by water, that jurisdiction, manifestly, no longer exists, as the entire claim for freight on account of that service has been satisfied by the respondents, tendering in to the Court the balance remaining due for that part of the service. The arrangements made by the Pacific Coast S. S. Co., with the railroad company, whereby the railroad charges were included in the whole freight charges as a lump sum, must obviously be treated as immaterial so far as the jurisdiction of this Court is concerned. As a matter of law, the Pacific Coast Steamship Company only became responsible as a carrier, when the sacks of barley were delivered to it for shipment on board its steamer. As was said in the *Richard Winslow*, 67 Fed. R., 259: "It is the general rule of law, respecting carriers of goods, that their liability as carriers terminates with the service of transportation, after a reasonable time and opportunity for the consignee to accept and remove them; and that for any storage thereafter, *or any storage previous to, and while awaiting orders of the shipper for forwarding, the liability is that of warehousemen only.* Pars. Con. c. 11, Sec. 9; 2 Am. & Eng. Ency. Law., 878, and note; *Peoria, etc., Ry. Co.* v. *United States Rolling Stock Co.*, (111) Sup., 27 N. E., 59. This rule applies to carriage

by water. Carv. Carr. by Sea, Sec. 472. As defined in *Kohn* v. *Packard*, 3 La., 224, the contract of affreightment by water is one 'to carry from port to port, and the owners of a vessel fulfill the duties imposed on them by delivering the merchandise at the usual place of discharge.' " The averments of the libel itself show that Moore, Ferguson & Co., were only obligated to pay for transportation from Moss Landing to San Diego, and nothing is said about railroad charges from Blanco, the place in the interior from which the barley was originally shipped. If the question in controversy were as to whether the respondents agreed to pay $4.35 or $3.35 per ton for the transportation from Moss Landing to San Diego—a difference simply as to the amount agreed upon—there would be no doubt as to the jurisdiction of this Court, and it would be incumbent upon it to proceed to a final decision upon the facts. But when the testimony discloses that the only point in dispute is as to whether or not the respondents agreed to pay the libelant for the railroad transportation from Blanco to Moss Landing, which, the testimony shows, the latter advanced it presents a question which the Court has no constitutional power to entertain or pass upon.

Let a judgment be entered in accordance with this opinion.

[Endorsed]: Filed November 5th, 1895. Southard Hoffman, Clerk, by J. S. Manley, Deputy Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of Cali-

fornia, held at the courtroom, in the City of San Francisco, on Tuesday the 5th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Wm. W. Morrow, Judge.

Pacific Coast Steamshp Company
vs.
E. W. Ferguson et al. } No. 11, 167.

Order for Decree.

This cause having been heretofore submitted to the Court for consideration and decision, now after due consideration had thereon, the Court renders its written opinion, and it is by the Court ordered that a decree in conformity therewith be duly drawn and entered.

In the District Court of the United States, for the Northern District of California.

Pacific Coast Steamship Co.,
Libelant,
vs.
Eben W. Ferguson et al.,
Respondents.

Petition for Re-hearing.

So long time has elapsed since this case was tried and argued, and matters of so much importance have since occupied your Honor's attention, that it would not be surprising if what seems to be, should be, the fact, that is: that the position, contended for by plaintiff, has been lost sight of.

Upon the general proposition, announced by the Court, that it has no jurisdiction to entertain suits to recover for storage, or for land transportation, we agree with the Court, and so stated at the argument.

But as it seems to us, that question of jurisdiction is in no way connected with the determination of the question of the balance due upon a marine contract of affreightment—which is the only question in this case—even though it should be necessary, in determining that amount, to determine, collaterally, whether or not a certain arrangement, relating to such marine affreightment, and other matters, had been entered into on land.

The single question here presented, for determination, by the libel, was the amount of the balance due, as freight, upon a water carriage.

The defence is, payment of all but a sum stated, and deposited in Court to the order of libelant.

The proof, to sustain the allegations to the libel, is that a sum in excess of the sum due for water carriage was agreed to be paid by defendants; that part payment of the whole sum was made; that of such partial payment libelant had appropriated—as it is authorized to do by section 1479 of the Civil Code of California—so much as was necessary in discharge of that portion of defendant's contract which related to land transportation, and the residue in partial discharge of their obligation upon the contract for water transportation.

Now, under these conditions, what is the question to be determined—that alleged by the libel—and to sustain which proof was offered? Or is it the collateral matter of fact upon the determination of which, if you please,

the final contention of the parties may turn? But how turn? It appears that certain moneys have been received by libelant, from defendants, and that a portion of such moneys has been applied in discharge of an obligation, of defendants, for land transportation. If libelant was authorized to make such application of such moneys then the sum claimed is due—otherwise not. May not this Court, incidentally, determine that fact, as a means of reaching a conclusion upon the question in issue? Can there be any doubt that it can.

Of course it often happens that the Court must, incidentally, pass upon many matters, the genuineness of a writing, for instance, offered as evidence and in proof of some fact tending to show the real right of the controversy—but if such were the case, in an admiralty proceeding, would this Court refuse to pass upon the question of the genuineness of that paper, because, forsooth, it should appear that it was one relating to the *building* of the ship—such contracts not being the basis for a suit in admiralty if the suit was *to recover the balance due on such contract.* Suppose the suit was instituted to determine the ownership of the vessel, could this Court not consider the contract for the building of the vessel as *evidence* bearing upon that question—would it be precluded from doing so because it had not jurisdiction over the subject matter of such contract? Clearly not.

If not in such a case, then why substantially that in this case, where the only bearing that the question relating to land transportation and storage can have, under the allegations of the libel and the proofs of the libelant—and such, if sufficient to raise an issue as to their truth, must

be sufficient to give this Court jurisdiction to determine their truth or their falsity—is, by its consideration and determination to enable the Court to say whether there is the balance due to libelant upon its contract for marine carriage, which is alleged to be due in this libel. Libelant has not asked of this Court, and does not now ask, any judgment that anything is due it for land carriage or for storage. As to such matters they are, so far as libelant is concerned, past and settled transactions—settled, when the moneys received from the Howard Commercial Company were applied by libelant in liquidation of them. This being so, they are eliminated from the matters to be adjudged—although necessary for the Court to determine as collateral facts—before it can render its judgment upon the issues made by the libel.

Another consideration: The libel is sufficient to give this Court jurisdiction, the answer concedes a balance of freight money as due to libelant for marine carriage. This being so, how is the jurisdiction of this Court ousted? Surely the tender and payment into court of a lesser sum that libelant claims cannot have that effect—no more in this case than in the other. But that the balance due is the only issue tendered or made by libelant.

What results? Simply this, that if the Court cannot consider anything relating to land carriage—has not jurisdiction to do so—then as all that matter is matter of defense; it has not jurisdiction of the matter of defense. Of course this cannot be so, for any matter of defense may be considered, and any collateral matter having a bearing as well, if the Court has jurisdiction to determine the single, final, issue which is to be determined by its

judgment—in this case a balance alleged to be due for marine transportation.

Again, it is well settled that jurisdiction must be determined from an inspection of the complaint—that is the Court's charter. A denial of the facts alleged cannot oust jurisdiction; if that were so the road of the defendants were an easy one. The determination of some jurisdictional fact by the Court may result when it shall have been done in depriving it of *further* jurisdiction in the proceeding, but that result can never be reached so long as there is a single issue remaining within the jurisdiction of the Court to determine, and that question *is* in this case, is alleged in the libel, is denied in part only by the answer.

What we desire is a determination of the ultimate fact in this case. We are disinclined generally to ask for rehearings by trial courts, preferring, as the more orderly course, the remedy by appeal; but in this case such a proceeding is out of the question.

We, therefore, most urgently request that this matter be reconsidered, and argument thereof again had, before the conclusion announced in the opinion of the Court, now on file, shall become final by judgment entered thereon.

Dated this 7th day of November, 1895.

GEO. W. TOWLE, JR.,
Proctor for Libelant.

[Endorsed]: Filed November 7th, 1895. Southard Hoffman, Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the City of San Francisco, on Tuesday, the 12th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Wm. W. Morrow, Judge.

Pacific Coast Steamship Company
vs.
Eben W. Ferguson et al. } No. 11,167.

Order Granting Petition on Re-hearing.

In this case the petition for a rehearing herein this day came on for hearing and said petition was duly argued by Geo. W. Towle, Jr., Esq., in support thereof, and by Wm. B. Treadwell, Esq., proctor for respondents and submitted. And after due consideration had thereon, it is by the Court ordered that a rehearing herein be and the same is hereby granted. And thereupon the cause was reargued by Geo. W. Towle, Jr., Esq., on behalf of the libelant and by Wm. B. Treadwell, Esq., proctor for the respondents, and submitted to the Court for consideration and decision.

In the District Court of the United States, in and for the Northern District of California.

Pacific Coast Steamship Co.,
Libelant.
vs.
Moore, Ferguson & Co.,
Respondents. } No. 11,167.
In Admiralty.

Opinion on Re-hearing Rendered Jan. 11th, 1896.

This was a libel by the Pacific Coast Steamship Company against E. W. Ferguson, Elida F. Hobson and John Cook, partners doing business under the firm name of Moore, Ferguson & Co., to recover a balance of freight alleged to be due.

GEO. W. TOWLE, JR., for libelant. W. B. TREADWELL appearing for MASTICK, BELCHER & MASTICK, proctors for respondents.

MORROW, DISTRICT JUDGE.

A libel in persona was filed in this case to recover a balance of freight alleged to be due for the transportation of 2,448 sacks of barley, weighing 271,510 pounds, on one of libelant's steamers, from Moss Landing to San Diego, both ports being within the State of California. The libel alleges that the rate of freight agreed upon was $4.35 per ton of 2,000 pounds, of which sum $2.50 per ton was to be paid by the Howard Commercial Company, of San Diego, the consignee of the barley. The balance of 1.85, including a charge of 25 cents per ton for storage in libelant's warehouse at Moss Landing, while awaiting transportation, was to be paid by Moore, Ferguson & Co., the shippers. It is averred that the Howard Commercial Company paid, upon delivery of the barley, their agreed portion of the freight, viz.: $2.50 per ton, but that the respondents, Moore, Ferguson & Co., have refused at all times to pay the balance claimed to be owing, viz.: $1.85 per ton, aggregating the sum of $251.15—the amount sued for. The respondents, in their answer, admit that

they agreed to pay libelant the sum of $3.10 per ton of 2,000 pounds as freight for the transportation of the barley from Moss Landing to San Diego, and that they would also pay to the libelant such storage charges on the barley as had theretofore accrued at the warehouse of the libelant at Moss Landing, which charges, they are informed and believe, were twenty-five cents per ton; they admit the payment of $2.50 per ton by the Howard Commercial Company. Pursuant to these admissions, the respondents allege that they had made a tender of the sum of $115.39, being the balance due the libelant in full satisfaction and payment of its demand, and this sum the respondents accordingly deposited in the registry of the Court for the libelant. This last sum added to the $2.50 per ton paid by the Howard Commercial Company makes the sum of $3.35 per ton, which the respondents claim was the freight charge agreed upon between the parties for the transportation of the barley from Moss Landing to San Diego, including the storage charge of 25 cents per ton. This leaves a charge of $1.00 per ton as the amount in controversy.

The evidence in the case shows that the rate of freight agreed upon for the transportation of the barley from Moss Landing to San Diego was $3.10 per ton, as alleged in the answer; that the warehouse receipt for the storage of the barley at Moss Landing contained a charge of 25 cents per ton, which Moore, Ferguson & Co. agreed to pay; that there was also an additional charge of $1.00 per ton, being the amount of the advance freight paid by the Pacific Coast Steamship Company to the Pajaro Valley Railroad Company for the transportation of the barley

by rail from a place called Blanco, in the interior of the State. to Moss Landing, on the coast, for shipment by vessel. Whether Moore, Ferguson & Co. agreed to pay this last charge the evidence is conflicting, but in the view I take of the evidence it is not necessary to determine this question.

G. H. Cooper, an employe of the Pacific Coast Steamship Co., who represented the company in the negotiations for the transportation of the barley, was called by the libelant, and testified that he informed the respondents that their rate from Moss Landing to San Diego was $3.10 per ton, and that there would probably be charges on the grain from some point on the narrow gauge railroad to Moss Landing. H. M. Goodall, also called for libelant, corroborates this statement. If such conversation relative to these back charges were had, it does not appear that the rate or amount thereof was fixed upon, or even referred to, until after the shipment on board of the steamer. It is denied by the witnesses for the respondents that anything was said about back charges for railroad transportation until after the grain had been actually shipped and was in the warehouse of the company at Moss Landing, or that the respondents agreed to do anything more than pay a difference of 85 cents per ton, the Howard Commercial Company paying $2.50 per ton, making a total charge, or rate, of $3.35 per ton, instead of $4.35, as is claimed by the libelant, which, of course, includes the $1 per ton railroad charges.

Conceding, for the purposes of the case, that the fact is, as testified to by witnesses for libelant, viz.: that the respondents had agreed to pay for the railroad transpor-

tation, yet this part of the transportation was clearly not maritime, and the contract, with respect thereto, not within the Admiralty jurisdiction. A contract, claim or service, to be cognizable in the Admiralty, must be maritime, in such a sense that it concerns rights and duties appertaining to commerce or navigation. *The Belfast*, 7 Wall., 624, 637. The service rendered must be maritime in its nature. *The Hendrick Hudson*, 3 Ben.,419, Fed. Cas., No. 6, 335; *A Raft of Cypress Logs*, 1 Flip., 543, Fed. Cas., No. 11,527; *Gurney* v. *Crockett*, Abb. Adm., 490, Fed. Cas., No. 5874; The *John T. Moore*, 3 Woods, 68, Fed. Cas., No. 7,430; *The Murphy Tugs*, 28 Fed., 429; *The Pulaski*, 33 Fed., 383.

As a matter of law, the Pacific Coast Steamship Company only became responsible as a carrier when the sacks of barley were delivered to it for shipment on board its steamer. As was said in *The Richard Winslow*, 67 Fed., 259: "It is the general rule of law respecting carriers of goods, that their liability as carriers terminates with the service of transportation, after a reasonable time and opportunity for the consignee to accept and remove them, and that for any storage thereafter, or any storage previous to and while awaiting orders of the shipper for forwarding, the liability is that of a warehouseman only. Pars. Cont. c. 11, Sec. 9; 2 Am. & Eng. Enc. Law, 878, and note; *Peoria & P. U. Ry. Co.* v. *United States Rolling Stock Co.* (Ill. Sup.), 27 N. E., 59. This rule applies to carriage by water. Carv. Carr. by Sea, Sec. 472. As defined in *Kohn* v. *Packard*, 3 La., 224, the contract of affreightment by water is one 'to carry from port to port, and the owners of a vessel fulfill the duties imposed on

them by delivering the merchandise at the usual places of discharge.' "

Whatever jurisdiction the Court may have had over the contract alleged in the libel, that jurisdiction does not extend to the controversy concerning the payment of the railroad charge of $1.00 per ton from Blanco to Moss Landing. The Court is, therefore, not called upon to determine whether there was any agreement upon that subject or not. The arrangements made by the Pacific Coast Steamship Company with the railroad, whereby the railroad charges were to be included in the whole freight charge as a lump sum, must, obviously, be treated as immaterial. No arrangement of transportation charges or statement of account can give this Court jurisdiction over a controversy that it does not have by law. Nor does the law relating to the application of payments transfer the controversy to the maritime feature of this contract. The evidence shows that it was the intention of Moore, Ferguson & Co. to apply the payment of $2.50 per ton made by the Howard Commercial Company, to the charge for water transportation from Moss Landing to San Diego, and the additional tender is specifically made to cover the balance of that charge and the amount due for storage at Moss Landing. How then can it be said that the balance claimed to be due is upon a maritime contract?

The libelant, having failed to prove that there was an agreement to pay more than $3.10 per ton for the transportation of the barley from Moss Landing to San Diego, the decree must be for the libelant for the sum tendered in Court.

I do not decide whether Moore, Ferguson & Co. as-

sumed the railroad charges due on the barley for transportation from Blanco to Moss Landing, in order to secure the delivery of the grain at the usual rate at San Diego, as claimed by libelants, as I deem the question of land transportation not within my jurisdiction to determine.

[Endorsed]: Filed January 11, 1896. Southard Hoffman. By J. S. Manley, Deputy Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the City of San Francisco, on Saturday the 11th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Wm. W. Morrow, Judge.

The Pacific Coast Steamship Company
vs.
Moore, Ferguson & Co. } No. 11,167.

Order for Decree on Second Hearing

This cause having been submitted to the Court for consideration and decision after a hearing hereof, now after due consideration had thereon, the Court renders its written opinion and by the Court ordered that the libelant recover the amount of tender and ordered that a decree in favor of libelant for the sum of $115.39 be duly drawn and entered, and further ordered that respondents recover its costs.

At a stated term of the District Court of the United States of America, for the Northern District of Califor-

nia, held at the courtroom, in the City of San Francisco, on Friday the 17th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Wm. W. Morrow, Judge.

Pacific Coast Steamship Company, vs. E. Ferguson et al.	No. 11,167.

Order for Decree

On motion of Mr. Treadwell, proctor for respondents, a decree in favor of libelant for $115.39, with costs in favor of respondents, was this day duly signed and entered.

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom in the Appraiser's building, in the city of San Francisco, on the 17th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: Hon. W. W. Morrow, District Judge.

Pacific Coast Steamship Company (a Corporation), Libelant, vs. Eben W. Ferguson, Elida F. Hobson and John Cook, Copartners, and doing business under the firm name and style of Moore, Ferguson & Co., Respondents.	No. 11,167. In Admiralty.

Decree

This cause having been heard on the pleadings and proofs, and having been argued by the advocates for the respective parties, and due consideration being had in the premises, it is now ordered, adjudged and decreed by the Court that the libelant do have and recover the sum of one hundred and fifteen dollars and thirty-nine cents ($115.39), being the sum tendered by the respondents and deposited in the registry of this Court, and that the libelant do pay to the respondents their costs to be taxed.

WM. W. MORROW, Judge.

[Endorsed]: Filed January 17th, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

Pacific Coast Steamship Company, Libelant, vs. Eben W. Ferguson, Elida F. Hobson, and John Cook, Co-partners, etc., Respondents.	No. 11,167. In Admiralty.

Respondent's Bill of Costs

Clerk's fees paid by respondents	$14 30
Marshal's fees paid by respondents	2 00
Commissioner's fees paid by respondents	3 50
Docket fee	20 00
	$39 80

UNITED STATES OF AMERICA, }
Northern District of California, } ss.

W. B. Treadwell, being duly sworn, deposes and says that he is one of the proctors for the respondents in the above entitled cause, and that the services charged in the foregoing bill of costs have been actually and necessarily performed as therein stated, and the payments therein charged have been actually and necessarily made.

W. B. TREADWELL.

Subscribed and sworn to before me this 17th day of January, 1896.

SOUTHARD HOFFMAN,
Commn'r U. S. Cirt. Ct. N. D. Cal.

Proctor's costs taxed at $39.80.

SOUTHARD HOFFMAN, Clerk.

To Mr. Geo. W. Towle, Jr., proctor for the libelant above-named:

You will please take notice that on Monday, the 20th day of January, 1896, at the hour of ten o'clock A. M., at the office of the Clerk of said Court, the respondents will apply to the Clerk of said Court to tax their costs in the above-entitled cause.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

Receipt of a copy of the within is hereby admitted this 17th day of January, 1896.

GEO. W. TOWLE,
Attorney for Libelant.

[Endorsed]: Filed January 17th, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

District Court of the United States, Northern District of California.

PACIFIC COAST S. S. Co.,
vs.
E. W. FERGUSON, ET AL. } No. 11,167.

BALANCE CLERK'S AND COMMISSIONER'S COSTS.

1895.

Aug. 19	Filing libs. not. setting cause	$ .20
28	Order hearing continued	.30
29	Hearing .30, swearing 3 wit. lib. .60	.90
	Filing lib. Exhibit "No. 1"	.20
	Swearing one wit. for resp	.20
30	Further hearing .30, swearing 2 wits. for resp	.70
	Filing resp. Exhibits "A, B & C"	.60
Sept. 10	Further hearing .30, Filg. testy. .20	.50
Nov. 5	Filing opinion 20 Order Judgt., ent. and decree, etc., .30	.50
7	Filing petition for rehearing	.20
12	Order hearing on pet	.30

1896.

Jan. 11	Filing opinion .20, Order lib. recover tender, etc., .30	.50
17	Order decree signed and entered	.30
	Filing decree .20, entering decree i fo .30	.50
	Filing resp. bill of costs	.20
	Filing clerk's bill of costs	.20
	Filg. Commissioner's bill of costs	.20
	Making and filing judgment record	2.30
	Dockets and Indices	4.00
	Stipulation	.20
		$13.00

COMMISSIONER'S COSTS.

1896.

Jan. 17—Oath to respdts. bill of costs ..... .50

$13.50

Clerk's and Commissioner's costs taxed at $13.50.

SOUTHARD HOFFMAN, Clerk.

[Endorsed:] Filed Jany. 17th, 1896. Southard Hoffman, Clerk.

In the District Court of the United States, in and for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Libelant, vs. EBEN W. FERGUSON, ELIDA F. HOBSON and JOHN COOK, Copartners, and doing business under the firm name and style of MOORE, FERGUSON & Co., Respondents.	No. 11,167. IN ADMIRALTY.

Petition of Appeal

To the Honorable Circuit Court of Appeals for the Ninth Circuit:

The appeal of the Pacific Coast Steamship Company, a corporation, libelant, above-named, respectfully shows:

That on the 23rd day of May, 1895, the libelant above-named, filed herein its verified libel against respondents, in a cause of contract civil and maritime, in which it

prayed damages in the sum of $251.15 together with interest and costs, upon an alleged breach of a contract for the maritime transportation and delivery of 2448 sacks of barley from Moss Landing, California, to San Diego, California.

That thereupon, and upon said 23rd day of May, 1895, monition was issued requiring respondents to appear and make answer to said libel.

That thereafter and on the ——— day of June, 1895, respondents appeared and filed in said Court their verified answer to said libel, in and by which said answer respondents denied that they had ever agreed to pay to libelant the sum of $4.35 per ton as alleged in the said libel, and therein asserted an alleged agreement had with libelant different from, and inconsistent with, that alleged by libelant in the premises, and further alleged a tender of the sum of $115.39, made by respondent to libelant, in satisfaction of its said demand, on the 16th day of November, 1894, and that the said sum was brought into Court and deposited in the registry thereof for libelant, in full satisfaction of its demand in the premises.

That thereafter, and on or about the 29th day of August, 1895, the trial of said cause upon the pleadings so made was commenced and the same continued from day to day until September 10, 1895, when the said cause was argued and finally submitted to said Court for its decision; that thereafter, and on November 7, 1895, said Court filed its opinion and decision, holding that it had not jurisdiction of the subject matter of said action and ordering that said libel be dismissed.

That thereafter and on the 9th day of November, 1895, libelant filed in said cause its petition for a rehearing thereof, and the same coming regularly on for hearing on the 12th day of November, 1895, was granted by said Court, and the said cause was thereupon, on last mentioned day, reargued and resubmitted to said Court for decision.

That thereafter and on the 11th day of January, 1896, said Court filed another opinion and decision in said cause, holding that the Court had not jurisdiction to determine the question at issue—presented by the libel and denial by the answer thereto—and directing judgment in favor of libelant for the sum of $115.39—the said amount alleged as tendered and deposited in the registry of the Court—and that respondents recover their costs.

That thereafter, and on the 17th day of January, 1896, the decree herein was signed and filed, on motion of respondents, and entered in favor of libelant for $115.39 and in favor of respondents for their costs, taxed at $39.80.

That said decree is the final decree of said District Court in the premises.

That thereafter, on the —— day of January, 1896, this appellant filed in said cause and served upon the proctor for respondents appellant's notice of appeal and assignment of errors, and obtained an order from said court and the Hon. W. W. Morrow, the Judge who tried and decided said action, permitting appellant to make this appeal.

That this appellant is advised and insists that said decision is erroneous, inasmuch as libelant was entitled to a decree for the sum demanded in its said libel, and for

interest and costs ; that the special contract alleged in said libel was proven; that the same was single and entire, and related wholly to the terms upon which the grain mentioned in said libel should be, and was, transported by water from Moss Landing to San Diego, and there delivered upon payment by the consignee of a part only of the sum agreed to be paid for such services, as provided by said special contract ; that the said contract was wholly maritime and within the admiralty jurisdiction of said District Court; that said Court refused to decide the matter in issue in this action, to wit: the existence or non-existence of the contract alleged in said libel, all to the prejudice of appellant.

And this appellant, for these and other reasons, set forth in its assignment of errors on file herein, appeals from the whole of said decree, and prays that this Court proceed and hear and examine the cause, and that the decree of said District Court may be vacated and an order be made directing said District Court to enter a proper decree in accordance with the final decision of this Court; and upon the hearing of said appeal, appellant will ask to make such amendments to its pleadings, and introduce such further evidence, as may appear necessary and just.

Dated San Francisco, January , 1896.

GEO. W. TOWLE, JR.,
Proctor for Libelant.

Service of the within Petition of Appeal and receipt of a copy admitted this 23rd day of January, 1896.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

[Endorsed]: Filed Jany. 23rd, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

UNITED STATES OF AMERICA.

In the District Court of the United States for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY,
Libelant,
vs.
EBEN W. FERGUSON, ET AL.,
Respondents.
No. 11,167.

Order Allowing Appeal

On petition of George W. Towle, Jr., Esq., proctor for Pacific Coast Steamship Company, libelant in the above-entitled cause, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree entered in the above-entitled action, on the 17th day of January, 1896, in said District Court be, and the same is hereby allowed.

Dated, San Francisco, January 23d, 1896.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Jany. 23d, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

Pacific Coast Steamship Company (a Corporation), Libelant, vs. Eben W. Ferguson, Elida F. Hobson, and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., Respondents.	No. 11,167. In Admiralty.

Notice of Appeal

To Eben W. Ferguson, Elida F. Hobson, and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., and to Messrs. Mastick, Belcher & Mastick, proctors for respondents.

Gentlemen: You, and each of you, will please take notice that libelant intends to, and hereby does appeal from the decree in the above-entitled cause to the Circuit Court of Appeals of the United States of America, for the Ninth Circuit.

Dated San Francisco, January 23d, 1896.

GEO. W. TOWLE, Jr.,
Proctor for Libelant.

Service of the within Notice of Appeal and receipt of a copy admitted this 23d day of January, 1896.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

[Endorsed]: Filed January 23d, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation),
Libelant,
vs.
EBEN W. FERGUSON, ELIDA F. HOBSON and JOHN COOK, copartners, and doing business under the firm name and style of Moore, Ferguson & Co.,
Respondents.

No. 11,167.

IN ADMIRALTY.

Assignment of Errors

Now comes the Pacific Coast Steamship Company, a corporation, libelant herein, and assigns errors in the decision and decree herein as follows, to wit:

I.

The Court erred in its refusal to find, to pass upon or to determine the single issue made by the pleadings in this case; that is, the issue whether there was a special contract between libelant and respondent, by which contract it was, as alleged by libelant, agreed that as a consideration for the transportation and delivery of the grain referred to in the libel libelant should be paid the sum of $4.35 per ton of 2,000 pounds, such sum to be paid to libelant as follows: $2.50 per ton by the consignee upon

the delivery of the grain to him at San Diego, the balance of said sum of $4.85—to wit, $1.85 per ton—to be paid by the consignors (respondents) at San Francisco upon demand thereof made subsequent to such delivery at said San Diego.

II.

The Court erred in this, that it failed to find that respondents promised and agreed with libelant, that there should be paid to libelant the sum of $4.85 per ton of 2,000 pounds, for each and every ton of the barley transported for respondents from Moss Landing to San Diego and there delivered to the consignee of the same; such sum of $4.35 per ton to be paid as follows, that is $2.50 per ton by the consignee upon delivery of the barley at San Diego, and $1.85 per ton by the consignors—respondents—at San Francisco, upon demand therefor made subsequent to such delivery at said San Diego.

III.

The Court erred in awarding judgment for libelant in the sum of $115.39 only, whereas the libelant is, and was, entitled to judgment for the sum of $251.15, with interest and costs.

IV.

The Court erred in awarding judgment in favor of respondents for their costs.

V.

The Court erred in holding that the claim of libelant that respondents agreed to pay to libelant the charges for railroad transportation, on the barley, from Blanco to Moss Landing, in order to procure the transportation of the barley to and its delivery at San Diego, upon the payment there of $2.50 per ton only, was without the jurisdiction of the Court to determine.

VI.

The Court erred in holding that the evidence shows that it was the intention of Moore, Ferguson & Co., to apply the $2.50 per ton, paid by the Howard Commercial Company, to the charge for water transportation from Moss Landing to San Diego, as such charge is limited by the Court, that is: to the discharge of $3.10 of the whole charge of $4.35 per ton, for service.

January 23, 1896.

GEO. W. TOWLE, JR.,
Proctor for Libelant.

Service of the within assignment and receipt of a copy admitted this 23rd day of January, 1896.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

[Endorsed]: Filed January 23rd, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation),
Libelant,
vs.
EBEN W. FERGUSON, ELIDA F. HOBSON and JOHN COOK, co-partners, and doing business under the firm name and style of MOORE, FERGUSON & Co.,
Respondents.

Stipulation Fixing Bond on Appeal

Stipulated and consented that the bond of libelant on appeal to the United States Circuit Court of Appeals in the above-entitled cause may be fixed at the sum of $300, and that the same when filed shall be effective as a bond for costs on such appeal, and as a supersedeas bond as well.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

[Endorsed:] Filed January 23, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the city of San Francisco, on Tuesday the 23d day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Wm. W. Morrow, Judge.

Pacific Coast Steamship Co., a Corporation,
vs.
Eben W. Ferguson, et al. } No. 11,167.

Order of Court Fixing Amount of Bond on Appeal

In this cause, on motion of proctor for libelant, and pursuant to stipulation of proctors for respondents, on file here, it is ordered that the bond of libelant, on appeal, herein be, and the same hereby is fixed at the sum of $300.

WM. W. MORROW, Judge.

[Endorsed]: Filed Jany. 23d, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

UNITED STATES OF AMERICA.

District Court of the United States of America, Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY
Libelant,

vs.

EBEN W. FERGUSON ET AL.,
Respondents.

Bond on Appeal

KNOW ALL MEN BY THESE PRESENTS:

That Pacific Coast Steamship Co., a corporation as principal, and Edwin Goodall and C. M. Goodall as sureties, are hereby held and firmly bound to the aforesaid respondents, their administrators, executors and assigns, in the sum of three hundred ($300) dollars, United States gold coin, to be paid to the aforesaid respondents, their administrators, executors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Dated this 24th day of January, 1896.

Whereas, the above-named libelant had appealed to the Circuit Court of Appeals of the United States, Ninth Circuit, to reverse the decree in the above suit by the District Court of the United States for the Northern District of California.

Now, therefore, the conditions of this obligation are such that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs, if he fails to make his appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

PACIFIC COAST STEAMSHIP CO.,
By GOODALL, PERKINS & Co.,
General Agents,
EDWIN GOODALL,
C. M. GOODALL.

UNITED STATES OF AMERICA, }
Northern District of California, } ss.

Edwin Goodall and C. M. Goodall, parties to the foregoing bond, being duly sworn, each deposes and says: That he is worth the sum of three hundred dollars, over and above his debts and liabilities.

EDWIN GOODALL,
C. M. GOODALL.

Subscribed and sworn to before me, this 24th day of January, 1896.

[SEAL.] JAMES L. KING,
Notary Public, in and for the City and County of San Francisco, State of California.

We are satisfied with the within bond and the sureties thereon.

MASTICK, BELCHER & MASTICK,
Proctors for Respdts.

APPROVED: WM. M. MORROW,
Judge.

[Endorsed]: Filed Jany. 24th, 1896. Southard Hoffman, Clerk.

In the District Court of the United States for the Northern District of California.

PACIFIC COAST STEAMSHIP CO.,
Libelant,
vs.
EBEN W. FERGUSON ET AL.,
Respondents.

Stipulation that Original Exhibits May be Used on Appeal and Order Thereon

Stipulated and consented that an order may be entered herein dispensing with the printing of the exhibits introduced herein in evidence by either party, and provising that originals of said exhibits may be used upon the appeal in the Circuit Court of Appeals of the United States of America for the Ninth Circuit.

Dated San Francisco, January 29, 1896.

GEO. W. TOWLE, JR.,
Proctor for Libelant.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

Pursuant to the above stipulation it is hereby ordered that the exhibits referred to therein need not be printed as part of the record on appeal herein, and that the same shall be certified by the Clerk of this Court to the Clerk of the Appellate Court, and may be used upon the hearing of the appeal in the said Appellate Court.

Dated San Francisco, January 29, 1896.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Jan'y 29th, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

District Court of the United States, Northern District of California.

PACIFIC COAST S. S. CO.,
vs.
E. W. FERGUSON ET AL. } No. 11,167.

Clerk's Costs on Appeal

1896.

Jan. 23.	Filing Petition on Appeal	$0	20
23.	Filing Order Allowing Appeal		20
23.	Filing Notice of Appeal		20
23.	Filing Assignment of Errors		20
23.	Filing Stipulation Fixing Bond on Appeal		20
			20
23.	Filing Order Fixing Bond on Appeal.		20
23.	Filing Request to Prepare Transcript.		20
24.	Filing Citation on Appeal		20
24.	Filing Bond on Appeal		20
24.	Filing Approval of Bond		20
29.	Filing Stipulation that Original Exhibits May Be Used on Appeal		20
	To making Transcript on Appeal, 350 folios at 20 cents per folio	70	00
	Seal and certificate		70
		$72	90

Clerk's costs on appeal taxed at $72.90.

SOUTHARD HOFFMAN, Clerk.

[Endorsed:] Filed January 29, 1896. Southard Hoffman, Clerk.

Certificate to Transcript

UNITED STATES OF AMERICA,)
Northern District of California,) ss.

I, Southard Hoffman, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and forty-five pages, number from (1) to (145) inclusive, contain a full, true and correct transcript of the record in said District Court in the cause entitled "Pacific Coast Steamship Company, a corporation, libelant, vs. Eben W. Ferguson, Elida F. Hobson and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., respondents," numbered 11,167, made up pursuant to rule 52 of the rules of the Supreme Court of the United States of America.

Witness my hand and seal of said District Court, at San Francisco, this 29th day of January, A. D. 1896.

[SEAL.] SOUTHARD HOFFMAN, Clerk.

[Endorsed]: No. 281. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific Coast Steamship Company, Appellant, vs. Eben W. Ferguson, et al., Appellees. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California.

Filed January 30, 1896.

F. D. MONCKTON,
Clerk.

No. 281.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PACIFIC COAST STEAMSHIP COMPANY, a corporation,
Appellant,

vs.

EBEN W. FERGUSON, ELIDA F. HOBSON, and JOHN COOK, co-partners, and doing business under the firm-name and style of Moore, Ferguson & Co.,
Appellees.

BRIEF FOR APPELLANT.

GEORGE W. TOWLE, Jr.,
Proctor for Appellant.

Section 1479, Civil Code, (referred to on page 36): "Where a debtor, under several obligations to another, "does an act, by way of performance, in whole or in "part, which is equally applicable to two or more of "such obligations, such performance must be applied "as follows:

"1. If, at the time of performance, the intention "or desire of the debtor that such performance should "be applied to the extinction of any particular obliga- "be manifested to the creditor, it must be so applied;

"2. If no such application be then made, the "creditor, within a reasonable time after such per- "formance, may apply it toward the extinction of any "obligation, performance of which was due to him "from the debtor at the time of such performance; "except that if similar obligations were due to him, "both individually and as a trustee, he must, unless "otherwise directed by the debtor, apply the perform- "ance to the extinction of all such obligations in "equal proportion; and an application once made by "the creditor cannot be rescinded without the consent "of (the) debtor;

"3. If neither party makes such application with- "in the time prescribed herein, the performance must "be applied to extinction of obligations in the follow- "ing order; and, if there be more than one obligation "of a particular class, to the extinction of all in that "class, ratably:

"(1) Of interest due at the time of the perform- "ance;

"(2) Of principal due at that time;

"(3) Of the obligation earliest in date of maturity;

"(4) Of an obligation not secured by a lien or col- "lateral undertaking;

"(5) Of an obligation secured by a lien or col- "lateral undertaking."

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PACIFIC COAST STEAMSHIP COMPANY, a Corporation,

Appellant,

vs.

EBEN W. FERGUSON, ELIDA F. HOBSON, AND JOHN COOK, CO-PARTNERS, AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF MOORE, FERGUSON & CO.,

Appellees.

No. 281.

Statement.

In October, 1894, libelant, the Pacific Coast Steamship Co., was engaged in business as a marine carrier of persons and property between ports in this State. It also, in connection with that business, controlled a warehouse at Moss Landing.

At that time respondents, Moore, Ferguson & Co., were engaged in the grain business, in San Francisco,

and had received an order for a lot of barley from the Howard Commercial Co., at San Diego. In looking about for barley with which to fill that order, respondents ascertained that Waterman & Co., of this city, had 2448 sacks of barley, in the warehouse of libelant at Moss Landing, which was for sale. Moore, Ferguson & Co., then opened negotiations with Goodall, Perkins & Co., the general agents of libelant in this city, to ascertain the terms upon which they could procure libelant to transport that lot of barley from Moss Landing to San Diego, and there deliver it to the Howard Commercial Company.

In response to inquiries, respondents were informed that the regular freight charge from Moss Landing to San Diego—that is, from the wharf at Moss Landing to San Diego—was $3.10 per ton of 2000 pounds, but that no grain originated at the wharf, and that there were probably back charges upon the grain, the exact amount of which was not then known at the San Francisco office, but which were designated as warehouse and railroad charges. Respondents then stated that the Howard Commercial Co. had a special rate, from libelant, of $2.50 per ton on their grain shipments from San Francisco to San Diego, and desired to know if the same rate could not be obtained from Moss Landing to San Diego. The reply, by libelant, was in the negative. Thereupon respondents inquired of libelant if an arrangement could not be made by which that lot of barley could be transported, by a vessel of libelant, from Moss Landing to San Diego, and there delivered to the Howard Commercial Co., libel-

ant receiving from Howard Commercial Co. $2.50 per ton, on delivery, and respondents to pay the balance due, on demand, in this city. To this it was replied that such arrangement could be made, provided it was understood that, as a condition thereto the sum to be paid, for such transportation and delivery, should be the sum of $3.10 per ton plus all transportation and warehouse charges existing upon the barley. This being, as alleged by libelant, agreed to, the barley was laden at Moss Landing, delivered in good order at San Diego, $2.50 per ton collected from the Howard Commercial Co., there, and demand thereafter made on respondents for the balance of the sum agreed to be paid—to wit: the sum of $1.85 per ton—amounting to the total sum of $251.15. Upon this demand being so made, respondents denied that the sum of $1.00 per ton for railroad transportation charges upon the barley, from Blanco to the warehouse at Moss Landing, had been included in the sum which was to be paid as a consideration for the transportation and delivery, as above stated, but admitted that the sum of 25 cents per ton storage charges upon the barley at Moss Landing had been so included. Upon receipt of the $2.50 per ton from the Howard Commercial Co. at San Diego, $1.00 per ton of the same was applied by libelant in discharge of the back charges upon the barley above referred to (page 21; and page 26, and page 30 of transcript); the whole was credited to Moore, Ferguson & Co., on account, and this suit brought to recover the balance due upon the special contract alleged.

Paragraph III. of the libel (page 3 of transcript),

is as follows: "That at and during all the times "herein referred to, libelant was the owner of, and "was in control of, that certain steam vessel named "'Bonita,' and that heretofore, to wit: on the 2d day "of November, 1894, said Moore, Ferguson & Co. "shipped on board said steamer 'Bonita,' at Moss "Landing, to be from said landing transported and "delivered to the Howard Commercial Co. at the port "of San Diego, all in the State of California, certain "merchandise, to wit: 2448 sacks of barley, marked "'96,' and weighing 271,510 pounds; and said Moore, "Ferguson & Co. then and there agreed, in con- "sideration that the same was so shipped and should "be so transported and delivered, to pay to libelant "the sum of $4.35 per ton of 2000 pounds for each "and every such ton of the same so shipped and "so transported and delivered. That at the time "aforesaid, to wit: the time said Moore, Ferguson "& Co. so shipped such barley, it was agreed by and "between said Moore, Ferguson & Co. and libelant, "at the special instance and request of said Moore, "Ferguson & Co., that such barley should be delivered "to the Howard Commercial Co. at San Diego, upon "the payment by said Howard Commercial Co. to "libelant, upon such delivery, of the sum of $2.50 per "ton of 2000 pounds for each and every such ton that "should be so delivered, which sum of $2.50 per ton "so to be paid should be credited as a payment, on "account, toward the payment of said sum of $4.35 "per ton agreed to be paid by said Moore, Ferguson & "Co., as above stated, the balance of such sum of

" $4.35 per ton, to wit: the sum of $2.10 per ton of " 2000 pounds, said Moore, Ferguson & Co. promised " and agreed, such delivery of said barley being first " made, to pay on demand to libelant."

The denials of the answer to this paragraph of the libel reads as follows:

"These respondents deny that, at the time and " place mentioned in the third article of said libel, " or at any time or place, or ever, or at all, these re- " spondents, or any of them agreed, either in con- " sideration that the said merchandise should be so " shipped, transported and delivered, or otherwise, " or at all, to pay to libelant the sum of $4.35 per ton " of 2000 pounds for each or any such ton of the same " to be shipped, or transported, or delivered, or any " sum exceeding $3.35 per ton of 2000 pounds." (Tr., p. 12.)

Admissions, and affirmative allegations, relating to the facts alleged in Paragraph III. of the libel also appear in the answer; but such we deem immaterial to our present purpose.

Paragraph IV. of the libel (page 4), reads as follows: " That thereupon, and thereafter, said barley, and all " thereof, was transported on said steamer, and on, " to wit, the 6th day of March, 1894, was delivered in " good order and condition to said Howard Com- " mercial Co., at said San Diego, *in full compliance* " *with the agreement above stated*, and there was paid " to libelant upon such delivery by said Howard Com- " mercial Co., and the same was accepted by libelant " *pursuant to the agreement with said Moore, Ferguson &*

" *Co.* the sum of, to wit: $339.38, being the sum of
" $2.50 per ton for each and every ton of 2000 pounds
" of such barley so shipped and so delivered."

The answer to this paragraph (page 4), is in the words following: "4. *They admit the allegations con-*
" *tained in the fourth article of said libel.*"

Paragraph VII. of the libel alleges (page 5), " That
" all and singular the premises are true and within
" the admiralty, and maritime jurisdiction of the
" United States, and of this Honorable Court."

There is no denial of these allegations. The answer also alleged a tender, of the amount respondents concede to be due libelant, before suit brought, and a payment of that sum into the registry of the Court.

Upon this state of the pleadings the parties proceeded to trial, and counsel for the libelant then claimed (pages 22-23), that the pleadings admitted all that was claimed by libelant. This was contested by counsel for respondents, and no direct ruling was made by the Court.

Upon the trial there was a conflict of testimony regarding the terms of the special contract alleged, such conflict being limited to the conversations had between the representatives of the respective parties relating to railroad charges on the grain. (See page 26 of transcript.)

The matter having been duly submitted, the Court, after deliberation, rendered its decision (pages 102-105), dismissing the libel for want of jurisdiction, in the Court, over the subject matter of the controversy. Thereafter a petition for rehearing was filed (pages

106-110), and granted, and the case re-argued and re-submitted. Thereafter the Court rendered its decision (pages 111-117), again refusing to pass upon, or determine, whether, or not, the special contract, relating to the transportation and delivery of the barley, was as alleged by libelant, the closing paragraph of the decision being as follows (pages 116-17): "I do not de-"cide whether Moore, Ferguson & Co. assumed the "railroad charges due on the barley, for transportation "from Blanco to Moss Landing, into order secure the "delivery of the grain at the usual rate at San Diego, "as claimed by libelants, as I deem the question of "land transportation not within my jurisdiction to de-"termine."

This last was the final decision in the case, upon which the Court made and entered its decree, from which this appeal has been taken.

Assignment of Errors.

Libelant specifies the following as errors committed by the learned Judge of the District Court:

(*a*). The refusal to decide the only issue made by the pleadings, to-wit: the terms of the maritime contract, relating to the transportation of the barley from Moss Landing to San Diego, alleged in the libel on file.

(*b*). The failure of the Court to find that there was, and is, due to libelant, upon the cause of action in its libel stated, the sum of $251.15 as in said libel alleged.

(c). The Court erred in awarding judgment for libelant in the sum of $115.39 only.

(d). The Court erred in holding that the special contract alleged in said libel, or any part thereof, or any matter involved in the making of such contract, was, or is, not within the jurisdiction of the District Court of the United States for the Northern District of California, to determine in this action.

(e). The Court erred in awarding judgment for respondents for their costs.

(f). The Court erred in holding that it was the intention of Moore, Ferguson & Co., that the $2.50 per ton paid by the Howard Commercial Co. at San Diego should be applied to the payment of a particular part of the sum due to libelant in the premises, that is, toward the discharge of $3.10 of the sum of $4.35 per ton due to libelant from respondents.

Brief for Appellant.

I.

Upon the first of the assignments of error, we submit that the learned Judge of the District Court was in duty bound to decide the issues made by the pleadings on file, if any issue was so made; and if the answer raised no issue, then to have awarded judgment in favor of libelant for the full sum demanded and for costs. That the libel is all that can be looked to to ascertain whether or not the Court has jurisdiction in a given case, and that for the purpose of that determination its allegations must be taken as true.

In this case the libel alleges a single maritime contract, a contract relating exclusively to a maritime service, to be performed for an alleged stipulated compensation. There is in the libel no reference, not the remotest possible, to any contract, or to any service not in the strictest sense maritime in character; not in the strictest sense of admiralty cognizance.

The answer does not, by any fact alleged, or in any way, raise the question of the jurisdiction of the Court in the premises. On the contrary, it alleges a payment into the registry of the Court of a lesser sum than that demanded by libelant, thereby, by implication, affirming that the Court had jurisdiction of the subject matter in controversy. Whence, then, comes that which shall divest the jurisdiction of the Court—debar it from deciding that libelant is entitled to the relief demanded?

The claim asserted is maritime. The answer, at the very most, only denies the justness of the asserted demand in its entirety. It admits that a portion of the amount for which judgment is demanded, which admitted amount includes a charge for storage, is due *upon the cause of action alleged*. (Transcript, p. 13.) If the payment of the storage charge (25 cents per ton, in addition to the regular freight charge, $3.10 per ton), constituted a single consideration for the contract and service, then, why may not the $1.00 per ton, railroad charges, have been also included in that consideration? The single issue is: Shall libelant have judgment for the amount demanded in the libel, or for the lesser amount conceded as due by the answer? The answer to

this question depends upon the terms of a parol contract relating exclusively to the conditions upon which the performance of a maritime service could be secured.

The service was performed in all respects as stipulated, and now the only question of difference is what was the consideration upon the faith of which that service was performed. Libelant asserts that a payment of $4.35 per ton was the stipulated consideration. Respondents assert, on the contrary, that $3.35 per ton only, was the consideration. This disputed question of fact it was the duty of the Court to determine in one way or the other, and that duty the Court has not performed. Instead, the learned Judge of the District Court has held that that controversy is not within his jurisdiction to determine. How has he reached so strange a conclusion?

It appears that the grain, transportation of which was desired, was in a warehouse situate at a distance from the parties who were negotiating for its transportation; that both negotiators were in ignorance of its condition, as being subject to "back charges" for transportation and storage, both or either. It was probable that there were such charges; it was possible that there were not. If there were such charges then to the extent that they existed they entered into the consideration of the parties to the contract. That such charges should be paid was one element of the consideration; that the regular freight charges, from Moss Landing to San Diego, should also be paid was another element of the consideration, and the two,

united and combined into one, constituted the single consideration to libelant for its special agreement to carry and deliver.

If the exact extent of the back charges upon the barley had been known to the parties at the time the contract was made, the memorandum of the contract would have been substantially as follows: $4.35 per ton, $2.50 per ton payable on delivery in San Diego, the balance, $1.85 per ton on demand in this city. The extent of the back charges not being known, the same result was reached by the agreement that $3.10 per ton and all back charges should be paid by respondents as the consideration for the special contract and service.

But a single contract was made; that related solely to the terms upon which the transportation and delivery of a single lot of barley could be secured. There was a single act to be done, and a single consideration for its performance. What constituted the elements of that single consideration can be of no consequence. It was, and was understood to be, a simple money payment. Two ways were open to the parties by which to state the extent of that payment: it could have been stated in dollars and cents, specifically and definitely, if known; or, being unknown, it could be stated, as it was stated, by reference to certain fixed facts which should determine, with equal certainty, the extent of the payment. There being but a single service and a single consideration for that service, we submit that it is entirely immaterial what may have been considered, by the parties to the con-

tract, in fixing the amount of the consideration that should be paid.

It should be borne in mind that the contract, in suit, related not to carriage in general — between Moss Landing and San Diego—and a delivery upon the full payment of charges, as is usual; but to the conditions upon which a particular lot of grain, then in the possession of libelant as warehouseman, would be carried and delivered upon a partial payment of the charges thereon only. The grain was held by libelant subject to a contract with the railroad company that had delivered it to libelant; that its charges for transportation—$1 per ton—should be paid that Company in the event that the barley was shipped to any point south of Moss Landing. (Tr., pages 32–34.) This being so, it was perfectly natural that the amount of that liability to the railroad, and storage charges, should be added to the ordinary freight rate when libelant was asked as to the terms upon which it would take from its warehouse, and deliver *that particular lot of barley* in San Diego; and it would be just as natural that the one desiring to secure the withdrawal of the barley from the warehouse and its delivery at San Diego should agree to pay the additional sum demanded, in order to secure such delivery. At all events a single act was stipulated for, and there was but a single consideration for the performance of that act. Exactly what that consideration, was is the question which it was the duty of the learned Judge of the District Court to decide; and the

failure to perform that duty is the basis of appellant's first assignment of error.

In the opinion of the Court first rendered (page 102), several authorities are cited to support its holding, that because the *conflict of testimony* here is whether respondents agreed to pay the back charges on the grain or not, that therefore the Court was without jurisdiction to determine that question. We think that an examination of those cases will show that they lend little support to the Court's position in the premises. As we read them, the question here under consideration was not involved in the decision of those cases.

The Belfast, 7 Wall., 624, presented the question whether a State could invest its Courts with admiralty jurisdiction.

The Hendrick Hudson, 3 Ben., 419, presented the question whether a floating hotel could be the subject of a salvage service.

Guerney vs. *Crockett*, Abbott, 490. presented the question whether a watchman on a vessel could enforce a lien for services, as watchman, in admiralty.

The John T. Moore, 3 Wood., 68, was like the last case.

The Murphy Tugs, 28 Fed., 429, presented the question whether a superintending engineer had a lien on the vessels.

The Pulaski, 33 Fed., 383, presented the question whether storage, as such, could be recovered in an Admiralty Court. It was held that it could not. But in that case the suit was for storage *eo nominee*.

The Richard Winslow, 67 Fed., 259, was, in principle, like the last. The suit was for damages to grain, *while held on storage.*

We have never contended that a suit for railroad transportation, or for storage, as such, was cognizable in admiralty, and it is not a little annoying that we should have been supposed to be so doing. But we have contended, and we do contend, that many elements may enter into, be considered by parties in making a contract, be merged in the consideration for that contract; and that when such is the case—as we claim has been the case, in the suit at bar—then, for all the purposes of that contract, they have lost their original character. An account stated, is a familiar example.

II.

The Court should, upon the pleadings and the evidence, have rendered judgment in favor of libelant for the amount demanded, $251.15 and interest and costs.

First. The pleadings, subdivision III. (pages 3 and 4), set forth the contract, and allege that the consideration to be paid was $4.35 per ton of 2000 pounds—$2.50 per ton by the Howard Commercial Co., on delivery of the barley, in San Diego, and the remainder, on demand, by respondents in this city. Subdivision IV. (pages 4), alleges a delivery in full compliance with the agreement alleged, and the receipt of the $2.50 per ton at San Diego pursuant thereto.

The allegations of subdivision IV. of the libel are all expressly admitted (page 14 of transcript).

It would seem that when it is admitted that a party has made full performance under an alleged contract —has in all things acted pursuant to the terms of that contract—that such admission carried with it an admission of the existence of the contract, the conditions of which had been performed. If we are right in this, then all that libellant demands is admitted by the answer.

Second. The evidence requires that libelant should have judgment for all that it demands. The negotiations were conducted by Mr. Cooper, representing libelant; and Mr. Ferguson and Mr. Cook, each acting separately, representing respondents.

In his opening statement, counsel for respondents said (page 26): "Your Honor will see the only "question at issue is, Was there anything said to "Moore, Ferguson & Co., at the time of this trans- "action, about railroad charges, or anything from "which they might take notice that there were rail- "road charges."

Upon this point Mr. G. H. Cooper, testified: "I "told him (Mr. Ferguson) our local rate from the "Landing to San Diego was $3.10 per ton of 2000 "pounds. * * * The rate of $3.10 per ton applied "only from Moss Landing to San Diego, though no "grain originated at Moss Landing; that there would "probably be charges on the grain from some point on "the Narrow Gauge Railroad to Moss Landing. (Page "27). Mr. Cook came down on Nov. 3rd, I think in

" the morning, about that matter. * * * I again
" spoke to him about the possibility of back charges
" on it. * * * He came down again the same
" afternoon and stated that he had found that his
" Company had charged Mr. Howard up with $2.50
" per ton only, and that is all they could charge Mr.
" Howard, no matter what the back charges might
" be on the shipment, therefore he would like us to send a
" telegram. I again spoke to him about the possibility
" of back charges. Mr. Goodall was present at the
" conversation. Everybody else had left; it was on
" Saturday afternoon * * * some time after
" 4 o'clock. I told him we had no record of the ship-
" ment. I did not know the number of sacks, and
" if he would advise me Monday morning about that
" we would telegraph. He came down, I think, the
" following Tuesday morning, and said he would like
" to have us telegraph. I again went over with him
" on the question of the probability of back charges
" from some point on the railroad to Moss Land-
" ing, and asked him, in view of that probability, did
" he wish us to telegraph to our agent to have the
" grain delivered at $2.50 per ton, collecting the bal-
" ance from his company here. He expressed his wish
" in the affirmative. A telegram was written by me,
" submitted to Mr. Cook, Moore, Ferguson & Co.'s
" representative, and sent. (Page 28–9). We have
" always collected at the rate of $1.00 per ton from
" Blanco to Moss Landing on grain going south."
(Page 36)

H. W. Goodall, testified for libelant. He said:

"I was a member of the firm in which I am now doing
" business, Piper, Aiden, Goodall & Co.

" Q. Were you in the office of Goodall, Perkins &
" Co. at any time when Mr. Cooper and Mr. Cook
" were having a conversation relating to the shipment
" of this barley?

" A. I was; one Saturday afternoon, after four
" o'clock. It is the custom of the Pacific Coast Steam-
" ship Company to close their office at four o'clock on
" Saturday. I think all the clerks, or the greater por-
" tion of them, had left the office. Mr. Cook came
" in. I was standing at the counter with Mr. Cooper
" at the time, and being there, I overheard the con-
" versation between Mr. Cook and him.

" Q. State so much of that conversation as you
" overheard at that time. * * *

" A. As far as I remember, Mr. Cook, representing
" Moore, Ferguson & Co., came in and wanted to ask
" Mr. Cooper if some arrangement could not be made
" whereby this grain could be delivered to Mr. Howard
" at the rate of $2.50 per ton; that they had arranged
" with him that all grain shipped by Moore, Ferguson
" & Co. to Mr. Howard should not be charged more
" than $2.50 freight. Mr. Cooper said, possibly there
" would be back charges, or railroad charges, at Moss
" Landing, which Moore, Ferguson & Co. would have
" to assume in order to secure the release of the grain
" at the usual rate at San Diego. He impressed that
" on Mr. Cook in my presence, and agreed with Mr.
" Cook to write out a telegram that evening, and Mr.
" Cook was to call in the following Monday morning

" with reference to the dispatch which was to be
" forwarded at that time.

" Q. That is the substance of the conversation, as
" you remember it?

" A. That is as I remember it, yes.

" Q. That is the only time you were present when
" this matter was referred to?

" A. The only time.

" *The Court*—Q. Nothing was said about railroad
" charges?

" A. Yes, there was.

" Q. What was said about railroad charges?

" A. Simply that there would probably be charges
" of the Narrow Gauge Railroad on this grain which
" would have to be assumed by Moore, Ferguson &
" Co. in order to secure the grain at San Diego at the
" usual rate.

" Q. Who said that?

" A. Mr. Cooper."

Mr. Edwin Goodall, a witness for libelant, testified that he was a member of the firm of Goodall, Perkins & Co.; that he remembered having the matter of this shipment of barley brought to his attention by Mr. Cooper; that the telegram was submitted to him before it was sent; that the relations between libelant and respondents had been, and were, friendly; and that respondents had, before this occasion, solicited accommodations from libelant which had been granted. (Page 42–43.)

Mr. E. W. Ferguson, a witness for respondents, testified that he was a member of the firm of Moore,

Ferguson & Co. (page 43); that he had a conversation with Mr. Cooper through the telephone with reference to this transaction; that the conversation was on the morning of Oct. 25 or 26, and was opened by him; that he said to Mr. Cooper, "that we had an inquiry "from the Howard Commercial Co. at San Diego for 50 "tons of barley; that I could not find any in San Fran- "cisco; that there was a lot at Moss Landing that was "available if a rate could be obtained by which it "could be shipped. The barley in the meantime had "been quoted to me at a price free on board at Moss "Landing." (Page 45.)

Later, Mr. Ferguson again called Mr. Cooper up on the telephone, and as he testified: "He (Cooper) said "that the rate on barley would be $3.10 from Moss "Landing to San Diego. (page 46.) * * * Later "in the same day by telephone the conversation (with "Mr. Cooper) was that I thought a trade had been "consummated for the barley. * * * The fourth "conversation had with Mr. Cooper on that very day "was after I completed the trade for the barley, on the "basis of his freight rate, and I telephoned Mr. Cooper "immediately that I had made the trade, and closed "it on that basis; and that as the Howard Commer- "cial Co. had a rate with them of $2.50 per ton from "San Francisco they knew no other rate and I had to "quote them on the basis of San Francisco rates; con- "sequently, as there was 60c per ton more on the barley "from Moss Landing to San Diego than from San "Francisco to Moss Landing, he should bill us the 60c "here, or we would send a check to the office, as they

" might desire, which was apparently satisfactory, and " so Mr. Cooper stated. Mr. Cooper then, however, " made the remark, 'There may be some advance " charges, or back charges.'" (Page 49.)

Mr. Ferguson states (page 59) that he did not visit the office of Goodall, Perkins & Co. at all.

Mr. John Cook, a witness for respondents, testified that he was one of the firm of Moore, Ferguson & Co. (page 63), and, further: "I requested Mr. Cooper to " telegraph his agent at San Diego to deliver this grain " to the Howard Commercial Co., collecting of him " the rate which he was entitled to from San Francisco, " $2.50 per ton, and we would pay him the difference " of 85c. This was late in the afternoon. * * * * " He (Cooper) said there might be some back charges " on that grain that he did not know the amount of " (page 69). I said to him that he (we) knew pre- " cisely what the back charges were, because he (we) " had obtained a negotiable warehouse receipt from " Waterman & Co., and the amount the warehouse had " earned up to that time, according to the specifica- " ions in the receipt, was 25c per ton. * * * " Then he referred to the subject of possibility of " freight from Blanco. " * * * He said there " might be some freight on that grain from Blanco. " My reply to him was, if there was any back freight " against that particular lot of grain, it would be so " specified on the warehouse receipt, because the ware- " house receipt was a negotiable instrument received " by bankers here as collaterals, and would be re- " ceived by any concern that was advancing money

" on property of that kind; and if there were back " charges it would be specified on the warehouse re- " ceipt, in order to constitute a lien against the grain.

" We discussed the matter pro and con: he main- " taining his position that there might be a freight " charge (page 70), and I claiming that it could not " be possible under the existing circumstances, accord- " ing to the terms of the warehouse receipt; and he " agreed to telegraph his agent at San Diego, and we " would pay him the difference of 85 cents per ton." (Page 71.)

On cross examination the witness testified as follows:

" Q. This conversation on the Saturday was the " final conversation between you and Mr. Cooper, as " you remember it, relating to the way in which freight " charge should be handled, was it?

" A. It was the final conversation, so far as I can " recollect it now. (Page 74.)

" Q. Did you understand that the matter was defi- " nitely settled on that afternoon?

" A. I did.

" Q. You say that on that afternoon Mr. Cooper " did refer to the facts that there might be other " charges than the wharehouse charges—these rail- " road charges?

" A. Back charges he specified first.

" Q. You say he spoke of Blanco. Are you familiar " with that country down there?

" A. No, sir.

" Q. Did you understand that Blanco meant a rail- " road charge?

" A. That was the intimation from his remark.

" Q. That was what you understood by it, was it " not?

" A. Yes, sir.

" Q. That Mr. Cooper then informed you that " there might be back railroad charges on this freight?

" A. Yes, sir.

" Q. That is what he meant to convey?

" A. That is what he meant to convey in the latter " part of his conversation.

" Q. And that is what you understood? (Page 75.)

" A. Yes, sir.

" Q. And then insisted that there could not be any " such charges?

" A. I did.

" Q. He, on the other hand, maintained his posi- " tion that he was fearful there was such a charge?

" A. Yes, sir; he said there was a possibility of it.

" Q. Yet you say in the face of that he agreed to " waive that possibility?

" A. He agreed to wire his agent at San Diego " to collect freight of Howard at the rate of $2.50 per " ton, and we were to pay the difference which " amounted to 85 cents. * * *

" Q. What argument did you use to induce him to " recede from his position, that there might be other " charges than those you stated?

" A. As I have already stated, I claimed that was a " negotiable warehouse receipt issued by their own " company, accepted by all grain dealers, and that if " there were any back charges at all, that constituted a

" lien against that grain, which would be so specified
" on the receipt. (Page 76.)

" Q. Is it not true that you, relying on your con-
" struction of that negotiable receipt, as you term it,
" said to yourself, 'It does not make any difference
" whether there was or not, they cannot collect from
" me, and I will pay the back charges?'

" A. Not necessarily.

" Q. And Mr. Cooper did not agree to accept the
" 85 cents. Were you not induced to agree that it
" should go forward on the general order standing
" (understanding), because of your reliance on your
" construction of the receipt?

" A. No, sir. I had discussed the subject thor-
" oughly with Mr. Cooper prior to this time, giving
" him a written memorandum of what we pledged to
" pay, and I did not depart from that understanding
" at all.

" Q. When was that memorandum given?

" A. That was at the second interview.

" Q. That was on the 27th of October?

" A. I think that was on the 27th. * * * (page
" 77).

" Q. How did this matter come up in the shape
" it did on this subsequent day in November, this
" Saturday afternoon. * * * Why did you not
" say to him (page 79) in that conversation, 'This has
" all been determined?'

" A. I did not say that in so many words; but the
" attitude which I assumed towards him, and my
" conversation with him, determined that.

"Q. You did not say to him, 'This matter has "been arranged before,' did you?

"A. I do not think I repeated those words.

"Q. Or anything equivalent to them?

"A. Or anything equivalent to them. * * * (Page "86.)

"Q. You think, then, this last conversation was "on November 3d, do you?

"A. My opinion is that it was quite a number of "days after I had delivered to Mr. Cooper the ware-"house receipt.

"Q. That had direct reference, did it not, to pro-"curing a telegram to be sent to deliver this grain on "payment of $2.50 a ton?

"A. That conversation had; yes, sir. * * *

"Q. That conversation brought up the exact condi-"tion on which such telegram would be sent, did it "not?

"A. Yes, sir.

"Q. And then it was that Mr. Cooper stated that "those back charges might exist?

"A. Yes, sir.

"Q. Then it was that it was arranged that a tele-"gram should be sent, with the understanding that "the balance of freight should be paid here? (Page "82.)

"A. The balance of the freight, together with the "storage.

"Q. And then it was, in connection with that, "that the discussion arose as to the probability of rail-"road charges, in addition to the freight charges and

" storage, about which the understanding arrived at,
" the difference existed between you and Mr. Cooper?

" A. As I have already stated, Mr. Cooper insisted
" that there might be back charges first. Then, when
" I explained to him about the warehouse receipt
" carrying the charges, he mentioned the freight pro-
" position.

" Q. The conversation grew out of the fact that
" there came a definite request for instructions from
" the office here, to the San Diego agent, to deliver,
" on receipt of $2.50 a ton?

" A. Yes, sir. * * *

" Q. Up to that time there had been no instruc-
" tions issued? You had procured no instructions
" from Goodall, Perkins & Co. to deliver that grain
" on receipt of $2.50 per ton at San Diego?

" A. Yes, sir; that was in harmony with our previ-
" ous arrangements.

" Q. I say, up to that time you had procured from
" them no instructions to their agent in San Diego?

" A. None that I am aware of." (Page 83.)

Mr. G. H. Cooper, being recalled, testified as follows:

" Q. Have you here the manifest of the steamer
" "Bonita," of this date?

" A. I have (producing); that is the manifest.

" *Mr. Towle*—The paper is entitled 'Manifest of cargo,
" November 2, 1894, from San Francisco to Moss
" Landing, to San Diego, per steamship "Bonita";
" Captain, P. Doran; Purser, J. J. Carrol; Shipper,
" Moore, Ferguson & Co.: Consignee, Howard Com-
" mercial Co.; from Blanco ex P. V. R. R.; marks, 96;

" pack ages, 2448 sacks of barley: weight, 271,510 lbs.;
" rate, $4.35; freight, $590.53; total, $590.53; 135 8-10
" tons, P. V. R. R., 271,510 lbs., at $1, $135.76; S. D.
" ⅛ of $454.77.' * * (Page 85.)

" Q. Have you any entry in other books in the
" office showing the carrying of a credit of this $1 to
" the railroad?

" A. Yes, sir.

" Q. Will you turn to those? * * *

" A. Here is a credit of the particular shipment in
" question to the railroad company.

" *Mr. Towle*—The entry which I offer in evidence
" now is on page 233 of freight book 90: 'Pacific Coast
" Steamship Company (page 86). Freight on cargo
" steamship "Bonita," voyage 419. From San Fran-
" cisco to San Diego and way ports and return. Sailed
" from San Francisco November 1st, 1894 Arrived
" in San Francisco November 9th, 1894. Entire charges
" on shipment, $590.53. From Blanco to San Diego.
" Credit P. V. R. R. 271,510 lbs. at $1, $135.76.' * * *
" (p. 87.)

" *Mr. Towle*—My question is, in making their charges
" for freight in the manifest, whether or not it is cus-
" tomary to specify separately advance charges, or
" whether it is all put in as a freight charge?

" A. Do you mean from Blanco?

" Q. Yes; Blanco, or anywhere? Where there are
" advance charges for transportation, before it comes
" into the possession of the Pacific Coast Steamship
" Company, and they forward it, do they render a bill
" for the whole amount, including the transportation

" or do they specify separately the advance charges?

" A. They specify separately the advance charges " when they have been advanced at the time and paid " over, when (page 89) it is not a through rate—been " actually advanced and paid over at the time.

" Q. Where it had not been, then what?

" A. Where it has not been paid over from Blanco, " it is customary to make the bill showing the rate " right from the original point of shipment to the des- " tination. * * *

" Q. So that the manifest in a shipment of that " character would not show the extent of the charge " from Blanco, for instance, to Moss Landing?

" A. No, sir.

" Q. It would all go in as the freight rate from " Blanco to San Diego?

" A. Yes, sir.

" Q. The adjustment as between the Steamship " Company and the Railroad Company would come " afterwards?

" A. Yes, sir. * * * (Page 90.)

" Q. You heard the testimony of Mr. Cook with " reference to your agreeing to accept 85c in full of all " transportation and warehouse charges on this grain, " and the surplus of freight 85c in excess of $2.50? " You heard his testimony on that?

" A. Yes, sir. * * * (Page 96.)

" Q. Supposing that Mr. Cook did make the state- " ment, which you say he (he says he) did, that they " would pay 85c in addition to the $2.50, did you re- " ply to that, that would be satisfactory to you, or any- " thing of that character?

" A. No, sir.

" *The Court*—Q. Did you, by your silence, give " consent?

" A. No, sir. I do not remember any such state- " ment or any such proposition on the part of Mr. " Cook—any specified amount mentioned.

" *Mr. Towle*—Q. When was the last conversation " with him, as near as you remember?

" A. November 6th.

" Q. Was that the day that the telegram was sent?

" A. Yes, sir.

" Q. Was he there at the time that telegram was " written?

" A. Yes, sir.

" Q. Was it submitted to him?

" A. It was.

" Q. And satisfactory to him?

" A. It was.

" Q. You heard the testimony of Mr. Ferguson " with reference to you agreeing to give that special " rate by telephone? Have you any recollection of " doing such a thing as that?

" A. My recollection is, in my conversation with " Mr. Ferguson I said I thought there would be no " objection to our delivering the grain at $2.50, and " collecting the balance of charges here from him— " from his company here. The final arrangements " were made with Mr. Cook. * * * (Page 97.)

" Q. Did you understand that any final arrange- " ment had been reached with Mr. Ferguson by tele- " phone?

"A. Not as to the proposition that we were to "deliver the barley at less than the ordinary rate.

"Q. Now, Mr. Cooper, when, in your mind, was "the question of the delivery of this grain at $2.50 at "San Diego, finally and definitely settled? At what "date? * * * (Page 98.)

"A. November 6th.

"Q. That is the date when the telegram was sent?

"A. Yes, sir.

"*The Court*—Q. This had been shipped on Novem- "ber 2d.

"A. Yes, sir.

"*Mr. Towle*—Q. Do you remember of any discus- "sion relating to the warehouse receipt and what was "shown upon that by Mr. Cook? You heard him "testify with reference to that?

"A. My recollection of that is that Mr. Cook "brought the warehouse receipt to our office and "handed it over to me, and I simply took it and took "it in the inner office, and the letter was written to "our agent on the same date, October 27th, enclosing "that receipt.

"Q. Do you recollect any discussion between Mr. "Cook and yourself with reference to what appeared "on that warehouse receipt as charges against this "grain?

"A. Yes, sir.

"Q. You heard him testify that that matter was "discussed?

"A. I remember him saying something about "there being a 25c storage charge.

"Q. Do you remember anything as to the discus-
"sion relative to other charges as stated by Mr. Cook?

"A. Do you mean with reference to the possible
"railroad charges?

"Q. Yes. (Page 99.)

"A. I remember stating that possibility to him on
"two occasions very explicitly and definitely.

"Q. Did you, in any conversation, recede from
"that?

"A. No, sir. As to my answer about November
"6th, perhaps I might explain that somewhat. I
"stated that November 6th was when I definitely un-
"derstood it to be settled that the barley was to be
"delivered at $2.50. On November 3d, in the after-
"noon, I told Mr. Cook that if he would telephone us
"the number of sacks, and so forth, the data, on the
"following Monday morning, I would arrange to have
"such a telegram sent. It might have been considered
"settled at that time. Mr. Cook came down on the
"following Tuesday morning and we re-opened the
"question; so November 6th was the date on which it
"was finally and definitely settled." (Page 100.)

The evidence, above referred to, shows that the usual charge upon the lot of barley in question was $4.35 per ton. Had there been no negotiations looking to the delivery of the grain at San Diego, upon a payment there of $2.50 per ton only, the whole $4.35 would have been collected on delivery, and as a matter of course.

In this state of the case, respondents applied to libelant for an accommodation, that is, the privilege of having the barley delivered to their consignee upon

a payment by him of $2.50 per ton, respondents to pay the balance due.

There can be no question but that the sum of $4.35 per ton was due to libelant from respondents upon the delivery of that barley in San Diego, in the ordinary course of business. The barley was delivered there in good order. This, nothing more appearing, places the burden of proving payment squarely on respondents, and this regardless of whether the proof of such payment shall consist of a claimed actual payment in coin; a claimed release by operation of a new contract; or from a combination of the two. If a partial discharge is, as here, claimed to have resulted from a *special* contract, then the burden is on the one so claiming to prove the contract, as he alleges it, by a preponderance of evidence. That preponderance, in favor of respondents, does not exist in this case. On the contrary, we submit that the preponderance of evidence is easily with libelant.

From the testimony of Mr. Ferguson, above quoted, it appears that Mr. Cooper raised the question of "back charges," or "advance charges," immediately the question of delivery on payment of $2.50 per ton only was suggested.

The testimony of Mr. Cook, above quoted, shows that Mr. Cooper was insistent in that particular down to, and at, the time the telegram was sent to the San Diego agent to deliver upon receipt of $2.50 per ton. Mr. Cook says that at that time the barley had been shipped, and he also states that a definite understanding had been had, with Mr. Cooper, as to the exact

amount that should be collected upon the shipment, that is: that that amount should be the local freight rate plus 25 cents per ton storage charges; $2.50 per ton to be collected at San Diego and 85 cents per ton to be paid by respondents in this city—that the grain had been ordered shipped and had been shipped, by respondents, as the result of that express and definite understanding had with Mr. Cooper, days before the application was made to Mr. Cooper for the telegram. But, if this statement be the fact, how explain the failure of Mr. Cook to refer to the fact of such positive agreement when, as he says, Mr. Cooper was, for the first time, raising to him the question of railroad charges? If an understanding, definite to a cent, had been reached prior to the shipment, surely Mr. Cook must have referred to a circumstance so material at the time he applied for the telegram, and when, for the first time, as he claims, the question of possible railroad charges was raised by Mr. Cooper. What more natural than for Mr. Cook to have then said: "Why, " Mr. Cooper, this matter has all been definitely set- " tled between us: we had definitely arranged this mat- " ter, the exact amount that should be paid and how it " should be paid, before we ordered the grain shipped " at all. It is now too late for you to raise such a " question."

We say it is manifestly impossible that Mr. Cooper could have done as Mr. Cook now claims that he did—when the telegram was applied for—without Mr. Cook then making some reference to a prior definite understanding covering the matter, if there had been such

an understanding. And Mr. Cook testifies upon this point (page 80):

"Q. You did not say to him, 'This matter has "been arranged before,' did you?

"A. I do not think I repeated those words.

"Q. Or anything equivalent to them?

"A. Or anything equivalent to them."

We repeat, that had there existed the definite understanding, to a cent, relating to the charges upon that shipment, which Mr. Cook asserts, he must have made some reference to that fact when he applied for the telegram—and he did not, at that time, refer to it.

The attitude of Mr. Cooper appears to have been consistent throughout. He was constantly calling the attention of Moore, Ferguson & Co. to the fact that they might be assuming the payment of a railroad charge for transportation upon this grain, if they proceeded as suggested. That they must assume the payment of that charge, if there was one, to secure delivery at San Diego on the payment, there, of $2.50 per ton. From this position he is shown to have never receded. Moore, Ferguson & Co., on the other hand, appear to have had a contract with Waterman & Co., from whom they purchased the barley, that the price to them, from Waterman & Co., should be "free on board" the vessel, at Moss Landing; that is, that Moore, Ferguson & Co. should deduct from the price of the barley the amount of all back charges upon the grain. That Moore, Ferguson & Co. did deduct the sum of 25 cents per ton storage, appears from the evidence; and that sum they concede is due libelant

under the terms of the special contract alleged in the libel. For some reason they appear not to have taken into account in their settlement with Waterman & Co., the fact that there were back railroad charges upon the grain. But if they were careless in that respect, it furnishes no good reason for holding that libelant should now make good to them the loss resulting from such carelessness—especially not, when, as here, it appears that libelant was constantly putting them upon notice that such charges might exist.

Reliance, in this matter, seems to have been inadvertently placed, by Moore, Ferguson & Co., upon the terms of the special contract, designated by Mr. Cook a warehouse receipt, a transcript of which appears on pages 66 and 68 of transcript.

That paper *is a special contract relating to the shipment* of the barley in question *to San Francisco*, when required by the owner, and its storeage at Moss Landing pending the time it should be ordered forward.

A careless reading of that paper seems to have produced the impression in the mind of Mr. Cook that there could be no other back charges on the barley than the 25 cents a ton *storage*, specified therein—this, although Mr. Cooper was directing his attention to the contrary.

But, we submit, this throws a strong light upon the then mental attitude of Mr. Cook. Having a contract with Waterman & Co. that the grain should be delivered to him free of all back charges, he settles with them without ascertaining definitely the extent of such charges. Having so settled with Waterman &

Co. is it improbable to suppose that he was then equally willing to agree to assume a future payment of all back charges as a means of securing his special end in view? If he was then willing to *presently* pay money to Waterman & Co. upon his faith, based, as appears, upon that special contract, and in opposition to the expressed fears of Mr. Cooper (pages 69–71), then why should he not then have been equally willing to assume a future payment of a possible charge, which he was satisfied, in his own mind, did not exist; that being the only matter standing between him and the accomplishment of his object, that is, such agreement to pay being the consideration exacted for the delivery of the grain at San Diego, upon the payment of $2.50 per ton there.

If, therefore, the only question to be decided, from this evidence, is as stated by counsel for respondents in his opening statement (page 26), to wit: "The only question at issue is, Was there anything said to Moore, "Ferguson & Co. at the time of this transaction about "railroad charges or anything from which they might "take notice that there were railroad charges," then, we submit, the answer to that question must be in the affirmative. That our second specification of error should be now held to have been well taken.

III.

The fate of appellant's third specification of error, that "the Court erred in awarding judgment for libelant "in the sum of $115.39 only," must depend upon what has already been called to the Court's attention.

IV.

Appellant's specification of error *d* may raise a new question, that is, the effect of an application of payments as affecting the cause of action in this case.

For the purpose of our discussion under this head we may assume that two contracts *may* have existed between libelant and respondents—one, that respondents would pay to libelant the amount of back railroad and warehouse charges on the grain; the other, that it would pay libelant freight on the grain from Moss Landing to San Diego. That such obligations—contemporaneous in point of time—should be discharged as follows, that is, $2.50 should be paid libelant through the Howard Commercial Co., on delivery of the grain at San Diego, and the balance by respondents, on demand in this city, nothing being provided as to the special application which should be made of either of the payments provided for. In such case libelant, upon receipt of the payment of $2.50 per ton at San Diego, applied so much of that as was necessary in discharge of the obligation of respondents to pay the railroad and warehouse charges. This libelant was authorized to do, under sec. 1479 of the Civil Code, and such application was made by libelant (page 3), and then applied the balance of the sum so received in discharge of the obligation of respondents still existing. This being done, demand is made upon respondents for the balance due to libelant upon the still subsisting obligation. That demand is resisted by alleging that respondents never assumed the payment of the railroad charges, and, as a consequence of that,

that respondents were indebted to libelant in a lesser sum than that demanded. Suit is brought to recover the balance alleged to be due, and the libel counts on a maritime contract, alone; the answer raising no issue save as to the amount due libelant upon that contract. That amount can be determined only by first determining whether the moneys received had been properly applied, by libelant; that in turn only by determining whether respondents had agreed to pay the back charges, and if it were found that they had, then the amount of such back charges must also be determined before the Court could reach a proper determination of the single issue pending before it, to wit: Are respondents presently indebted to libelant in the sum demanded, as a balance due upon the performance of a maritime contract? To us, to state the case is to have fully argued it; and we confidently submit that the learned Judge of the District Court has fallen into error in holding that such matters, incidentally necessary to be determined, are, or that any one of them is, beyond the jurisdiction of the Court to so incidentally determine.

V.

The Court erred in awarding respondent's judgment for their costs (specification of error *e*), without having determined whether the sum tendered libelant by respondents, before suit brought, was the whole sum due.

There was, clearly, but one contract entered into be-

tween the parties—libelant had fully performed—a sum was due libelant from respondents. Demand was made for $251.15 in settlement of all existing demands, in the premises. This demand was met by a tender of the sum of $115.39 in full payment of all demands. If, in fact, the sum of $251.15 was due, from respondents to libelant, then, of course, the tender was not good, would not bar libelant from recovering its costs. This being so, how can respondents be entitled to a judgment for their costs in the absence of a determination that they had made a full tender of all that was due to libelant, in the premises; and the Court has expressly refused to so find.

VI.

The fate of appellant's specification of error *f* must depend, incidentally, upon the matters to which the Court's attention has already been directed.

The amount involved in this suit is small—so small that but for the principle involved libelant might, perhaps, better have submitted to the loss imposed, as the result of the decision by the Court below, than to have been to the expense attending this appeal—better than to have troubled this Court with the determination of a matter of so small immediate pecuniary concern. But appellant conceives that if the demand in suit may be split up in the way held by the District Court, that then very many contracts of marine affreightment may be—must be split up in the same

manner, and for similar reasons, to the necessary great loss and inconvenience of those whose business it is to make and perform such contracts.

Respectfully submitted,

GEO. W. TOWLE, Jr.,
Proctor for Appellant.

No. 281.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PACIFIC COAST STEAMSHIP COMPANY,
Appellant,

vs.

EBEN W. FERGUSON et al.,
Appellees.

BRIEF FOR APPELLEES.

E. B. & GEO. H. MASTICK,
Proctors for Appellees.

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Brief for Appellees.

STATEMENT.

The statement of facts in appellant's brief is inadequate for a proper presentation of this case. Counsel for appellant has stated, as facts, only what he conceives the testimony on behalf of libelant tends to prove, and has practically ignored the testimony given for respondents in contradiction thereof. Nor do we agree that even the evidence for libelant tends to prove what counsel claims.

We therefore think it best to make a complete statement of the facts.

The testimony of the witnesses in this cause is, as to certain matters, very conflicting; but, as to most of the material facts, there is no dispute. We will first state the facts as to which there is no conflict, and then, separately, the testimony on the disputed matters.

The evidence shows, without conflict, these facts: The libelant was engaged in the business of transporting freight and passengers by steamship between various points on the Pacific Coast.—among others, between San Francisco and San Diego; on which latter route there was a stopping point called Moss Landing. At that place libelant had a warehouse, in which it received property on storage. Moss Landing was also a station on the Pajaro Valley Railroad. Some grain, amounting in the year in question to several hundred tons, is raised near Moss Landing, and hauled to the warehouse there by teams; but the greater portion of the grain stored there is brought by the railroad from interior points. On October 15, 1894, libelant received in that warehouse from one J. R. Silveira 271,510 pounds of barley, for which it delivered to him a negotiable receipt, (pp. 66–8) which acknowledged the receipt of that grain in that warehouse, "for storage and shipment to San Francisco, at "the rates and subject to the conditions on reverse side" thereof. On the back of this receipt was a list of "Rates and Conditions," containing, among other things, the following:

"Rates for 2,000 lbs.

"Storage for the first month or fraction of month after Oct. 12, 1894..... 25c.

* * * * *

"For transportation to San Francisco, via Pacific Coast S. S. Co.'s Vessels, * * * $3.50

* * * * *

"While the goods are in the warehouse, the company shall be liable only as warehousemen, and not as carriers.

"Goods may be withdrawn from warehouse for local use or consumption on payment of accrued storage and endorsement of and surrender of warehouse receipt.

* * * * *

"When you want the within mentioned article shipped, fill out in ink the following order, and send it to the warehouse."

This receipt was afterward endorsed by Silveira, and passed in the course of business to Waterman & Co., grain merchants at San Francisco. This grain, it appears, had been shipped from Blanco to Moss Landing, over the railroad.

Respondents were commission merchants at San Francisco. They received an order from the Howard Commercial Company at San Diego to purchase a quantity of barley and ship the same to it at San Diego. On inquiry in the market, they received an offer from Waterman & Co. to sell them this lot of barley, "free on board" at Moss Landing. Thereupon, on October 26, 1894, Mr. Ferguson, one of the respondents, communicated by tele-

phone with Mr. Cooper, a gentleman in the employ of libelant, and asked him to name a rate at which libelant would transport this barley from Moss Landing to the Howard Commercial Company at San Diego. Mr. Cooper stated that the rate would be $3.10 per ton of 2000 pounds. It appears that the Howard company had an arrangement with libelant for a special rate on barley from San Francisco to San Diego of $2.50 per ton; and Mr. Ferguson endeavored to induce Mr. Cooper to make the same rate from Moss Landing; but Mr. Cooper refused to recede from the rate fixed of $3.10 per ton. Several interviews followed between Mr. Cooper and respondents, as to the details of which the testimony is conflicting. The result, however, was that respondents purchased the grain from Waterman & Co., deducting from the purchase price the sum of 25 cents per ton for storage, shown to be due by the warehouse receipt, received the receipt and ordered the grain to be shipped by libelant to San Diego, which was done on November 2d. The witnesses agree that, by the arrangement between the parties, libelant was to deliver the grain at San Diego to the Howard company upon the payment of $2.50 per ton freight, and respondents were to pay the balance of the freight rate and the 25 cents per ton storage. Libelant claims that respondents further agreed to pay $1.00 per ton for the original transportation of the grain over the railroad from Blanco to Moss Landing. Respondents deny this; and the testimony on this point is conflicting, and will be stated hereafter. Under the arrangement, whatever it was, the grain was shipped and delivered at San Diego to the Howard company, and that company paid to libelant

$2.50 per ton on account thereof. Respondents thereupon tendered and offered to pay to libelant the balance of the freight rate of $3.10 per ton,—namely, 60 cents per ton,—and the 25 cents per ton for storage; amounting in all to $115.39. Libelant refused to accept this amount, claiming that respondents should also pay the $1.00 per ton railroad charges, amounting to $135.76; and this charge is the only matter in controversy between the parties in this suit. In the libel, it is alleged that libelant agreed to transport the grain from Moss Landing to San Diego for $4.35 per ton, and libelant claims $251.15 as the balance of "freight" due for such transportation. The answer denies any agreement for freight at $4.35 per ton or at any rate greater than $3.10 per ton, admits an agreement to pay $3.10 per ton freight and 25 cents per ton storage, and pleads payment of $2.50 per ton and tender of the balance of 85 cents per ton, the amount of which tender—$115.39—respondents brought into court with their answer.

On the question whether or not respondents agreed to pay the $1.00 per ton, alleged railroad charges, we will state the testimony in connection with our argument of that question. For the present, it is sufficient to say that the evidence, *viewed most favorably for libelant, and excluding all the testimony on behalf of respondents contradicting that on behalf of libelant,* tends, at the most, to prove that the contract between the parties was this: That libelant should transport the grain to San Diego for $3.10 per ton, and there deliver it to the Howard Commercial Company upon the payment of $2.50 per ton; and that respondents should, after such delivery, pay to

libelant the balance of said freight rate, namely, 60 cents per ton, the 25 cents per ton for storage, and whatever railroad charges might be found to have accrued on the grain prior to its delivery at the warehouse at Moss Landing. (It is undisputed that neither Mr. Cooper nor respondents, at the time of the making of the contract, knew where this grain originated, or whether there were any back railroad charges on it, and that respondents had no notice of the possible existence of any such charge, unless it was given to them by Mr. Cooper during the progress of the negotiations.)

On the other hand, we contend that no contract on the part of respondents to pay any railroad charges was proved; but that the proof shows, by a preponderance of evidence, that respondents bought the grain and paid the purchase price thereof on the faith of the terms of the warehouse receipt and of the agreement of libelant to transport it to San Diego for $3.10 per ton, and without any notice of any charge thereupon except the storage charge of 25 cents per ton shown by the receipt, and that they never contracted to pay and were not requested by libelant to pay any other charge whatever.

This being the state of the case, we submit:

1. That, assuming the facts to be as the testimony for libelant tends to prove, a court of admiralty has no jurisdiction of the alleged contract to pay railroad charges, because the jurisdiction of courts of admiralty, in cases of contract, is confined to those contracts which are *purely* maritime; a contract to pay railroad charges is not a maritime contract; if the contract claimed by libelant be regarded as entire and not separable, a material and sub-

stantial portion of it is not maritime, and therefore the contract is not at all maritime; while, if that contract be regarded as separable, as in fact it is, the only portion of it in controversy in this case is not maritime, and cannot be made the basis of a recovery in admiralty.

2. That the alleged contract to pay railroad charges is not proven

In his brief, counsel for appellants claims that libelant applied, and had the right to apply, the payment of $2.50 per ton by the Howard company, in part to the payment of this disputed charge for railroad transportation, and that this suit, therefore, concerns only a claim indisputably maritime. We shall show that the facts are not as claimed, and that there never was, and could not lawfully have been, any such application of that payment.

Counsel also claims that the District Court erred in awarding costs to the respondents; but we shall show that the decree was correct in this, as in all other respects.

We will discuss these propositions separately, and, so far as possible, in such order as to avoid repetition.

Argument.

I.

THE CONTRACT RELIED ON BY LIBELANT IS SEPARABLE AND NOT ENTIRE; AND THE ALLEGED CONTRACT TO PAY RAILROAD CHARGES IS SEPARATE AND DISTINCT FROM THE CONTRACT TO PAY FREIGHT BY SEA.

The contract, assuming it to be as libelant's testimony tended to prove, consisted of two distinct parts: first, that libelant, *as a warehouseman*, would deliver the grain out of its warehouse into the ship, respondents paying it therefor such charges for storage and prior transportation as had accrued; and, second, that libelant, *as a carrier*, would transport the grain to San Diego, respondents paying it therefor the sum of $3.10 per ton.

The rule on this subject is, that "if the part to be "performed by one party consists of several distinct "and separate items, and the price to be paid by the "other is apportioned to each item to be performed, or "is left to be implied by law, such a contract will gen- "erally be held to be severable."

2 Parsons on Contracts, (8th Ed.,) *517, and authorities there cited.

This case is manifestly within that rule. The amounts which libelant claims that respondents agreed to pay, were clearly and distinctly apportioned to separate items; respondents were to pay $3.10 per ton for the transportation from Moss Landing to San Diego, they were to pay 25 cents per ton for the storage (already accrued) in the warehouse, and libelant claims that they were to pay whatever back railroad charges had accrued for the pre-

vious transportation by land to libelant's warehouse. This latter item, of course, could not concern libelant, unless it had paid or agreed to pay it to the railroad company, or unless the railroad company had a lien on the grain in the warehouse for its freight charge. In either of these alternatives, the libelant was interested only as a warehouseman, that is, interested not to permit the grain to leave the warehouse without payment of this charge. Clearly, then, the payment of storage and back freight charges, if agreed to by respondents, was, by the alleged contract, apportioned solely to the delivery of the grain out of the warehouse, and had no connection with the further contract for transportation by sea. These two portions of the contract were so distinct that they might well have been entered into at different times, and the consideration for each was wholly separate and independent.

In this connection, and in connection with other points in the case, it is important to notice the distinction between the libelant as a warehouseman and the libelant as a carrier. It is evident that libelant, though a carrier, was also actively engaged in the entirely different business of a warehouseman. The warehouse receipt in question, though containing other contracts, is clearly a storage receipt. It expressly provides that the company holds the goods in the warehouse "*only as warehousemen and not as carriers*," and expressly provides for the withdrawal of the goods from the warehouse for purposes other than shipment. But, beyond all this, it is the settled law that a carrier who has received goods for transportation, but who holds them awaiting orders for shipment, is,

while he so holds them, a mere warehouseman and not a carrier; and the same rule holds in the case where the carrier retains the goods after the transportation is completed, until the consignee chooses to take them away.

St Louis, A. & T. H. R. Co., v. *Montgomery*, 39 Ill. 335;

Barron v. *Eldredge*, 100 Mass 455;

Mt. Vernon Co. v. *R. R. Co.*, 92 Ala. 296;

O'Neill v. *R. R. Co.*, 60 N. Y. 138;

Schmidt v. *Ry. Co.*, 90 Wis. 504;

The Richard Winslow, 67 Fed. Rep. 259; 71 Fed. Rep. 426.

The contract in question, then, necessarily consisted of two contracts: one with the libelant as a warehouseman, and one with it as a carrier; and the fact that these contracts were made at the same time, related to the same general subject, and were parts of one transaction, does not make them any the less two contracts. The alleged contract to pay railroad charges could, therefore, have been separately sued upon, even if the grain had been lost at sea so that no freight could be earned; and this suit is a suit on that contract alone.

II.

THE ALLEGED CONTRACT TO PAY BACK RAILROAD CHARGES WAS NOT A MARITIME CONTRACT, OF WHICH COURTS OF ADMIRALTY HAVE JURISDICTION, AND WAS NOT MADE SO BY BEING CONNECTED WITH OR DEPENDENT UPON A MARITIME CONTRACT.

The jurisdiction of courts of admiralty in this country, in cases of contract, is confined to contracts of the kind

called maritime. In order to determine whether a contract is maritime or not, regard is to be had solely to the nature of the acts agreed to be done, and it is not maritime unless it concerns rights and duties pertaining to commerce and navigation.

The Eclipse, 135 U. S. 599, 609.

In order, then, that a contract may be regarded as maritime, it must directly relate to the employment of a vessel as an instrument of commerce, or to the navigation of a vessel so employed. If the contract does not directly relate to one of those subjects, it is not maritime, even though it be preliminary to a maritime contract, or though it be made in consideration of a maritime service, or though it be made at the same time as a maritime contract and as a part of the same transaction. The nature and extent of the rule will best be seen by reference to some of the cases in which it has been applied.

The case of *The Pulaski*, 33 Fed. Rep. 383, is almost precisely like the one at bar. That was a libel upon a contract, by the terms of which the libelant delivered on board a vessel a quantity of wheat, to be held and stored on board until the opening of navigation, unless sooner discharged by the shipper; and, if not discharged, the wheat was to be transported by the vessel to some other port, *for the consideration of two and a quarter cents per bushel for proper storage during the winter, and the going freight for transportation.* This contract was held not to be maritime, and the court said:

"The contract is primarily for storage, and the trans-
"portation is a mere contingency, possible or probable, in
"the future. The wheat is received subject to the order

"of the shipper, who may demand a redelivery the next "day; *and, even if it were definitely understood that the "wheat was to be transported upon the opening of navi- "gation to a distant port, the fact that a separate price was "charged for the storage during the winter would tend to "show that, in fact, there were two separate contracts, one "only of which was maritime.* * * * To be the sub- "ject of an admiralty lien for a breach of contract, the "vessel must be, at the time, engaged in commerce and "navigation, or in preparation therefor, *and the service "must be maritime in its nature.*"

In the case at bar, the railroad charges, if any, had accrued, and the contract for storage had been entered into, long before the contract for transportation to San Diego was made or thought of. It is therefore clear that, as against Silveira, no suit in admiralty could have been maintained for the railroad charges. As said in the case cited, the contract with him was primarily one for storage, and the transportation a mere contingency. The contract with respondents was made only on the theory that they had succeeded to Silveira's liabilities, and that they should pay what he was bound to pay. The fact, if it be a fact, that respondents expressly agreed to pay the railroad charge, became necessary only because that charge was not specified in the warehouse receipt. Had it been there specified, they would have been bound to pay it. The utmost effect of the statements testified to by Mr. Cooper was merely that respondents thereby had notice of a possible lien on the barley for prior transportation, which they had to discharge or assume to pay before they could remove the barley from the warehouse. They were,

therefore, merely performing the contract made by Silveira, which, as shown by the case cited, was in no sense maritime.

But, even were it otherwise, the rule would still be as stated in that case. Libelant's contention is not that respondents agreed to pay $4.35 cents per ton for transportation from Moss Landing to San Diego, (though it is so stated in the libel); but it is that, in consideration that libelant should so transport the barley, and should deliver it at San Diego upon an agreed part payment, respondents would pay $3.10 per ton for that transportation, and would *also* pay *whatever back charges had previously accrued on the grain*, the amount thereof not being then specified or even known. As said in the case cited, the fact that this alleged promise was to pay for the storage and railroad charges, *as such*, and that a separate price was charged for the freight by sea, shows that there were really two contracts, of which the former was not maritime. In either point of view then, the case cited is, in principle, precisely like the present one.

The case of *The Richard Winslow*, 67 Fed Rep. 259, is the converse of the one last cited, and is, in one respect, even stronger. The contract there was that the vessel should immediately transport certain grain to another port, and there keep it, *in the vessel*, during the winter, unless sooner unloaded by the shipper, *the price for the entire service being fixed at three cents per bushel.* It was held that a court of admiralty had no jurisdiction of a libel for damage to the cargo while the grain was

held in the vessel at the port of arrival. The court said:

"If any cause of action is shown, I think it is not within the cognizance of admiralty. With the termination of the carriage the water-borne character of the contract ceased, and the vessel was converted into a mere winter storehouse for the corn. It is true that the ordinary contract of affreightment includes, and is only discharged by, delivery to the consignee; but here there was a constructive delivery, so far as concerned that contract, and thenceforward the corn was taken under the new bailment, that of warehouseman. Jurisdiction of that liability does not pertain to the admiralty." [Citing *The Pulaski, supra.*] "The storage here in question was no more an incident of the transportation than it was there. The division of the contract into its separate characters is here marked by the constructive delivery at Buffalo. The storage side of the contract was not maritime."

That case, as before remarked, is especially strong, because there one single price was fixed for the entire service,—both transportation and storage.

That case was affirmed (since the decision of the case at bar in the District Court) by the Circuit Court of Appeals (71 Fed. Rep. 426,) the court saying:

"The contract here was dual in its character. * * * A maritime contract must concern transportation by sea. It must relate to navigation and to maritime employment. It must be one of navigation and commerce on navigable waters. Unquestionably there was here

" a contract for carriage by sea, and that contract was " maritime in its nature. But there was joined with it a " contract with respect to the cargo after the completion " of the voyage, that was in no respect maritime in its " nature."

In *The Murphy Tugs*, (28 Fed. Rep. 429, 432,) a charge for wharfage of a vessel while laid up for the winter was held not to be maritime or within the admiralty jurisdiction. A similar ruling was made in *The Sirius*, (65 Fed. Rep. 226,) as to the services of a ship's keeper while the vessel was out of commission; in *The Hendrick Hudson*, (Fed. Cas. No. 6,355,) as to salvage of a dismantled vessel not then employed in commerce and navigation; in *A Raft of Cypress Logs*, (Fed. Cas No. 11,527.) as to services in navigating a raft of logs on navigable waters; and in *Gurney* v. *Crockett*, (Fed. Cas. No. 5,874,) as to a ship's keeper. Each of those cases was decided upon the principle above stated.

This rule was applied as long ago as 1803, in the case of *L'Arina* v. *Manwaring*, (Fed. Cas. No. 8,089). There the master of a vessel. lying at Havana, contracted to employ the libelant, for a voyage to Charleston and return, at certain monthly wages; which contract provided that if the voyage should be changed, or if the vessel should not return to Havana, the libelant should receive 200 dollars above his monthly pay. It was held that the contract was separable, and that the provision for the payment of the 200 dollars was not within the admiralty jurisdiction, though connected with a maritime contract.

It is evident, therefore, that, regarding the alleged

contract to pay railroad charges as distinct and separable from the contract for transportation by sea, (as we submit it should be regarded,) no recovery can be had in admiralty upon that contract. The consideration for that promise, if such promise there was was the prior and completed transportation by land. Indeed, it was, in terms, a promise to pay for such prior transportation by land. Though connected with a contract for transportation by sea, and forming with it a single transaction, it was nevertheless a separate and distinct contract, not maritime in its nature, and not cognizable in admiralty.

Counsel for libelant claims that this alleged promise was made in consideration of the agreement to transport by sea and to deliver to the consignee upon payment of a part only of the freight charge. His position is, substantially, that libelant said to respondents, "We will transport this grain to San Diego for $3.10 per ton, and there deliver it to the consignee on the payment of only $2.50 per ton, if you will agree to pay the balance of 60 cents and whatever railroad and storage charges have already accrued." The evidence, considered most favorably for libelant, does not warrant any such construction of the contract, as we will hereafter show. But, granting its correctness for the sake of the argument, it does not distinguish this case from that of *The Pulaski*, and still less from that of *The Richard Winslow*. State it in what form of words you will, it was nothing but a contract to pay for land transportation. It is not claimed by libelant that respondents agreed to pay, in addition to the $3.10 per ton, either $1.00 or $1.25 per ton. It is merely claimed that they agreed to pay the railroad and storage charges

if any there were. If there had proved to be no such charges, they would have had nothing to pay on that account. If it were true, then, that that promise was made, and was made in consideration of the agreement to transport by sea, that fact would not render the promise a maritime one; and it would be no more within the jurisdiction of a court of admiralty than a promise to convey a tract of land in consideration that the promisee should transport certain freight for the promisor by sea.

III.

THE JURISDICTION OF COURTS OF ADMIRALTY, IN CASES OF CONTRACT, IS LIMITED TO SUCH CONTRACTS AS ARE PURELY MARITIME; AND, THEREFORE, IF THE ALLEGED CONTRACT BE REGARDED AS ENTIRE AND NOT SEPARABLE, NO PART OF IT IS WITHIN THE ADMIRALTY JURISDICTION.

We have so far discussed the case on the theory (which we believe to be correct) that the alleged stipulation for the payment of railroad charges is separable from the rest of the contract. But, if we should concede the contract to be entire, in such sense that the agreement to transport the grain from Moss Landing to San Diego could not, for any purpose, be separated from the agreement to pay for the prior transportation by land, the only result would be that the contract would be not at all maritime, and there would be no jurisdiction in admiralty as to any part of it. When any material or substantial part of an indivisible contract is of a character not maritime, the courts of admiralty are without jurisdiction, even though some parts of the contract would be, if standing alone, of a maritime

nature. This doctrine has been uniformly maintained in this country.

In *Grant* v. *Poillon*, 20 How. 162, 168, the court said:

"The jurisdiction of courts of admiralty is limited, in "matters of contract, to those, and to those only, which "are maritime."

And the court quoted with approval the following language from the syllabus to *Plummer* v. *Webb*, *infra*:

"A contract of a special nature is not cognizable in the "admiralty, *merely because the consideration of the contract* "*is maritime*. The whole contract must, in its essence, "be maritime, or for compensation for maritime service."

In *People's Ferry Co.* v. *Beers*, 20 How. 393, 401, the court said:

"The admiralty jurisdiction, in cases of contract, de- "pends primarily upon the nature of the contract, and "is limited to contracts, claims, and services, *purely* "maritime, and touching rights and duties appertaining "to commerce and navigation."

In *The Belfast*, 7 Wall. 624, 637, the court, enumerating the subjects of admiralty jurisdiction, said:

"Contracts, claims, or service, *purely* maritime, and "touching rights and duties appertaining to commerce "and navigation, are cognizable in the admiralty."

In *Ex parte Easton*, 95 U. S. 68, 72, the court said:

"Admiralty and maritime jurisdiction is conferred by "the Constitution, and Judge Story says it embraces two "great classes of cases,—one dependent upon locality, "and the other upon the nature of the contract. * * *

"Speaking of the second great class of cases cognizable in the admiralty, Judge Story says, in effect, that "it embraces all contracts, claims, and services which "are *purely* maritime and which respect rights and "duties appertaining to commerce and navigation. * * *

"Maritime jurisdiction of the admiralty courts in "cases of contracts depends chiefly upon the nature of "the service or engagement, and is limited to such subjects as are *purely* maritime, and have respect to commerce and navigation within the meaning of the "Constitution."

And, in *The Eclipse*, 135 U. S. 599, 609, the court said:

"The [admiralty] jurisdiction embraces all maritime "contracts, torts, injuries or offenses, and it depends, "in cases of contract, upon the nature of the contract, "and is *limited* to contracts, claims, and services *purely* "maritime, and touching rights and duties appertaining "to commerce and navigation."

This principle was applied in *Plummer* v. *Webb*, (Fed. Cas. No. 11,233,) by Judge Story, who did more than any one to enlarge the conception of admiralty jurisdiction to its present wide extent. That case was a libel *in personam* for breach of a contract by which the minor son of the libelant was shipped by his father on a vessel of which the defendant was master, to serve on the vessel without wages, and by which the master agreed, among other things, to give the boy good, careful, tender, and paternal usage. The breach alleged was a

violation of the latter stipulation. The libel was dismissed for want of jurisdiction. Judge Story, after a splendid vindication of his course in contending for the most liberal construction of the powers of courts of admiralty, said:

"The difficulty is in affirming this contract to be *solely* "*and exclusively* a maritime contract. * * * So far "as the services of the boy are concerned, these services "are principally maritime; but they constitute, not the "ground of the present claim, *but the consideration for* "*the stipulations of the Master for paternal and proper* "*usage*. * * * I cannot say that the whole contract "is here of a maritime nature. There is mixed up in it "obligations ex contractu not necessarily maritime; and "so far the contract is of a special nature. In cases of "a mixed nature it is not a sufficient foundation for ad-"miralty jurisdiction, that there are involved some ingre-"dients of a maritime nature. *The substance of the* "*whole contract must be maritime*. * * * If the "contract were to convey a farm or a house, or to build "a mill, or to furnish manufacturing machines, or to "weave cloth, in consideration of marine services, it "would hardly be contended that a court of admiralty "had authority to enforce these special stipulations. In "such a mixed contract the whole would most appropri-"ately belong to a court of common law. After consid-"erable reflection upon the subject, I have not been able "to persuade myself that a contract 'for good, careful, "kind, tender, and parental usage,' in consideration of "marine services, upon a special retainer without wages, "is properly cognizable in an admiralty forum."

And the syllabus of that case, prepared, as we are told by Judge Story himself, contains the language quoted by the Supreme Court in *Grant* v. *Poillon, supra.*

This question was elaborately considered by Mr. Justice Nelson in *The Pacific.* (Fed. Cas. No. 10,643.) The jurisdiction of the court of admiralty was maintained in that case, on the ground that the contract was maritime in all its parts; but the principle for which we contend was vigorously maintained. The court there said:

"The first ground of objection is founded upon a course "of reasoning which cannot be maintained. It assumes "that the contract is severable, and that parts of it may "properly be the subject of admiralty cognizance, being "for maritime services, and parts of it not, being for "services that relate to subjects not maritime in their na- "ture or object; and that, if the cause of action arises "from a breach of the latter stipulations, the remedy is "in the common law courts, and if of the former, it may "be in the admiralty, assigning the jurisdiction to the "different tribunals according to the nature of the stipu- "lations of which a breach is charged.

"Now, the short and obvious answer to all this is, that "the contract is an entirety; and that, in order to ascer- "tain whether it is the proper subject of admiralty juris- "diction, we must look to the whole and every part of it, "the same as we must look to the whole and every part "of a contract when endeavoring to ascertain its legal "import and effect. *It must be wholly of admiralty cog-* *"nizance, or else it is not at all within it. There canno* *"be a divided jurisdiction.*

"The argument is also put in another form. Assum-

"ing the contract to be an entirety, and not partible, and "that it must be so viewed in endeavoring to ascertain its "nature and character with reference to the jurisdiction "to be exercised, it is urged that it must then appear "that all its material and substantial parts going to make "up the essence of the contract are maritime in their "character and object, and for the performance of mari- "time services; and that, inasmuch as the material parts "of the contract in this case are not of that description, "but relate to other subjects, such as the fitting up of the "ship and limitation of the number of passengers, it can- "not be regarded as the subject of admiralty cognizance.

"No doubt, if this analysis and interpretation of the "contract could be maintained the conclusion would be a "sound one."

It would seem obvious, on principle, that such must be the rule. The moment it is ascertained that a contract is an entirely,—that it is really one contract and not merely several connected contracts,—it follows that the only forum in which a remedy can be had for a breach of that contract must be that forum which has jurisdiction over the whole contract and every part of it. If there be a substantial part of the contract which is not within the admiralty jurisdiction,—a jurisdiction which is special and limited,—resort must be had to the courts of common law and equity, which alone possess general jurisdiction. It therefore cannot avail libelant to claim that the contract in question is entire and inseparable.

In some of the cases cited under this head and under the preceding one, a distinction is made as to stipulations, which though not maritime in themselves, are merely

incidental to a maritime contract. There are cases, no doubt, in which the existence of such stipulations will not deprive the contract of its maritime character. Thus a contract to supply a traveler with food and medicine, even at sea, is not necessarily a maritime contract. But a contract by the owner of a vessel to transport a passenger by sea, and, during the voyage, to provide him with food and medical attendance, all for a single price in gross, is undoubtedly a maritime contract. The transportation by sea is the principal thing and the various things to be done by the owner are so connected that the incidental things partake of the nature of that to which they are incident. So, where goods are delivered to a carrier for immediate transportation by sea, with a stipulation that, until *he* is ready to load them into the vessel, he shall store them in his warehouse, he is liable, during that period of storage, as a carrier and not merely as a warehouseman, and the whole contract is maritime. In such case, the storage is a mere incident to the transportation. But, if the contract be that the carrier shall receive the goods into his warehouse, and there store them while awaiting orders for shipment, and shall transport them by sea when directed by the shipper, all for a single fixed price, the storage is itself a principal thing, and is not so necessarily connected with the transportation as to partake of its character. And it is obvious that the bare fact that several promises are made in one contract, does not show that some of them are merely incidental to the others. That question must be determined by the nature of the acts agreed to be performed. It is, perhaps, difficult to frame a rule which will afford a proper test in

all cases; but we believe it to be generally correct to say that one of such acts will not be deemed merely incidental to the other, unless the latter act be, in its nature, the principal thing contracted for, and the former act be one intended to render the performance of the principal act more beneficial to the promisee, or to facilitate its performance. We believe that there has never been a case where a stipulation for the sole benefit of the promisor has been held to be a mere incident to the thing promised by him.

However this may be, the present case presents no difficulty on this score. As we have before pointed out, the alleged promise of respondents to pay railroad charges, concerned the libelant only in its capacity as warehouseman, while the agreement for transportation was made by libelant in its character as carrier. The case is precisely the same as if the warehouse had been operated by one person and the ship by another, and a separate contract had been made with each. The alleged promises in this case are as distinct in their nature as in the case supposed; and the only bond of union between them is the accidental fact that they were made with one person, who happened to be acting in those two different capacities. For all the purposes of this case, the libelant must be considered as two distinct persons,—the one a warehouseman and the other a carrier; and a promise made to it in the former capacity cannot be deemed merely incidental to an agreement with it in the latter character.

IV.

No question of application of payments arises in this case.

Counsel for libelant contends that libelant appropriated the $2.50 per ton, paid by the Howard Commercial Company, to the satisfaction of its demand for railroad charges; and that, therefore, it is suing here only for a balance due upon the freight by sea, which is within the admiralty jurisdiction. There are several conclusive answers to that contention.

(*a*) No such application is disclosed by the evidence. There is not a syllable of testimony to show that libelant ever made any particular application of that payment. On the contrary, libelant's own evidence shows (pp. 29, 34) that, after that payment had been made, libelant made a formal demand on respondents *for this particular $1.00 per ton;* thereby conclusively negativing any such appropriation of the payment as is now claimed.

Nor is any such application averred in the libel. It is there alleged that respondents agreed to pay $4.35 per ton for transportation from Moss Landing to San Diego, and that there had been paid $2.50 on account thereof; and (p. 4) that it was agreed that that sum "should be "credited as a payment, on account, toward the payment "of said sum of $4.35 per ton." Those allegations are entirely inconsistent with any appropriation of that payment to any particular item or items, and libelant is bound by its pleading.

The citations of the record in libelant's brief are not to the point. The testimony on page 30 simply shows

that libelant had paid this charge to the railroad company, and says nothing about any application of this payment. That settlement with the railroad company, moreover, was had (p. 33) on February 11, 1895, not only long after the payment in question, but (p. 34) long after a specific demand had been made on respondents for the payment of this particular item; and the witness testifies (p. 34) that, at the time of that demand, there was no entry on libelant's books of any such charge.

The citation to page 21 is to the opening statement of counsel for libelant, which is certainly not evidence. That to page 26 is to the opening statement of counsel for respondents, which is likewise not evidence, unless it contains an admission; and there is no such admission. The mere statement of counsel of their understanding of the difference between the parties as to the facts certainly cannot be taken as an admission of the correctness of any part of the statement of either,— clearly not as to a matter not put in issue by the pleadings. As, however, libelant's own testimony directly negatives the appropriatoin now claimed, the matter is not of much importance.

(*b*) The evidence shows beyond question that respondents intended that payment to be made on account of the $3.10 freight rate, and that libelant was well aware of that fact at the time of the payment. It was therefore bound to apply it in accordance with that known intention. When the intention of the debtor, at the time of payment, is known to the creditor, or is evinced by the

circumstances of the case, the creditor is as much bound thereby as by an express direction of the debtor.

Hanson v. *Cordano*, 96 Cal. 441;
Tayloe v. *Sandiford*, 7 Wheat. 14, 20;
Phillips v. *McGuire*, 73 Ga. 517;
Holley v. *Hardeman*, 76 Ga. 328;
Seymour v. *Van Slyck*, 8 Wend. 403;
Stone v. *Seymour*, 15 Wend. 19;
Shaw v. *Picton*, 4 B. & C. 715.

Thus, the creditor can not apply a payment to a debt of which the debtor was unaware, (73 Ga. and 76 Ga. *supra*,) nor to a debt which the debtor denies, (7 Wheat. *supra*,) nor to a debt which the debtor supposed was not yet entered on the creditor's books. (8 Wend. and 15 Wend. *supra*).

In the present case, the testimony of Mr. Cooper himself shows (pp. 27, 28) that the $2.50 per ton to be paid by the Howard company was fixed because that company had a special freight rate of that amount from San Francisco and expected to pay no more, and that it was understood to be a part payment on the $3.10 freight rate from Moss Landing. His conduct shows that he acted throughout on that assumption, for he testifies (pp. 29, 34) that, after that payment, he demanded *this identical $1.00 per ton*, from respondents. Mr. H. W. Goodall, a witness for libelant, testifies (p. 40) that, in the conversation between Mr. Cooper and Mr. Cook, (the last conversation between the parties,) Mr. Cook stated that the arrangement with the Howard Company was that they "should not be charged more than $2.50 *freight*," and

that Mr. Cooper said that, in that event, respondents "would have to assume" the back charges, in order to have the grain delivered at San Diego "at the usual rate."

Moreover, it is undisputed that, at no time during these conversations nor at any time until after this payment, did respondents, or even Mr. Cooper, know the amount of the alleged railroad charge, nor even whether there was any such charge. It was considered as a mere possibility. (Pp. 27, 28, 32, 33, 40.)

It is evident, then, from libelant's own testimony, that it was understood between the parties, in the beginning, that the payment of $2.50 per ton to be made at San Diego was on account of the freight by sea; and, of course, that was the understanding of the Howard company when it paid it. And, as, at the time of that payment, neither respondents nor the Howard company knew that there was any railroad charge to be paid, and as libelant was aware of their lack of information, it was bound to know that that payment could not have been intended to apply to any such charge. Libelant, therefore, had no legal right to apply that payment to anything but the sea freight.

(*c*) On November 16, 1894, respondents rendered to libelant a statement, (pp. 72-3,) in which they credited the payment of $2.50 to the account of the $3.10 sea freight, and which made no reference to any railroad charge. As this statement purported to be an adjustment of the whole transaction, it was an unequivocal repudiation of any liability for any such railroad charge. It cannot be pretended that, up to that time, libelant had

made any special application of the payment in question. At some time in November, the exact date not being alleged or proven, (pp. 4, 34,) libelant demanded of respondents this $1.00 per ton. As the grain was shipped on November 2, and the telegram to San Diego was sent November 6, there can be no presumption that this demand was made before November 16; and, as against the pleader and the party holding the burden of proof, it must be presumed to have been later. The adjustment between libelant and the railroad company was not had until February 11, 1895. It is therefore certain that no such application as libelant claims had been made (if any was ever made) up to the time of the rendition of respondents' statement. As that statement repudiated any liability for any railroad charge, this matter is ruled by the settled principle that the creditor can make no application after a controversy has arisen between the parties.

U. S. v. *Kirkpatrick*, 9 Wheat. 720, 737;
Robinson v. *Doolittle*, 12 Vt. 246, 249;
Milliken v. *Tufts*, 31 Me. 497, 501;
Applegate v. *Koons*, 74 Ind. 247.

V.

THE EVIDENCE DOES NOT SHOW THAT RESPONDENTS EVER CONTRACTED TO PAY THE ALLEGED RAILROAD CHARGE.

If, as we confidently believe, this controversy is not one of admiralty jurisdiction, it will not be necessary for the Court to examine the evidence on this point; and we might well rest the case without discussing it. But, lest we should be supposed, by silence, to admit the fact to be as contended by libelant, we will briefly refer the Court

to the evidence as to this matter. Counsel for libelant has undertaken to quote a considerable portion of the testimony in his brief; but his quotations are but partial, and much important matter is omitted.

On this question, the burden of proof is clearly on libelant. Libelant has alleged a contract to pay $4.35 per ton for carrying this freight. This allegation is denied by respondents; and libelant must, of course, prove it, and cannot recover except upon a preponderance of evidence.

The testimony of the witnesses is conflicting and, indeed, directly contradictory. As the witnesses are, so far as appears, of equal credibility. the contention of libelant must fail, unless there are circumstances in the case to turn the scale in its favor. No such circumstances have been pointed out by counsel for libelant; while, as we shall show, the circumstances, so far as they go, corroborate the testimony of respondents. As it will be necessary, if this point be considered at all, for the Court to read the entire evidence, and as that evidence is brief and simple, we shall not attempt any elaborate analysis of it. It will be sufficient to refer to the salient points.

It is conceded on both sides that, at some stage of the transaction, the attention of respondents was called to the possibility of back railroad charges on this grain; and the only dispute is as to whether that information was given before the conclusion of the bargain, and whether respondents ever agreed to pay any such charge.

Mr. Cooper, for libelant, testifies (p. 27) that he had a conversation with Mr. Ferguson, one of the respond-

ents, by telephone, in which he fixed the freight rate from Moss Landing to San Diego at $3.10 per ton, and that he then informed Mr. Ferguson "that there would "probably be charges on the grain from some point on "the narrow gauge railroad to Moss Landing"; that Mr. Ferguson stated that he might wish to have the grain delivered at San Diego at the Howard rate,—$2.50,— and that witness replied that that could probably be arranged. He does not claim that Mr. Ferguson agreed to pay any such railroad charge.

It was shown by libelant that the grain was shipped by a steamer which sailed November 2d. (P. 85.) Mr. Cooper testifies (pp. 28, 29, 35) that, on November 3d, (after the grain had gone forward,) he had a conversation with Mr. Cook, another of respondents, in which he "again spoke of the possibility" of such back charges; and that Mr. Cook thereupon requested him to telegraph the agent at San Diego to deliver the grain for $2.50, he agreeing that libelant should collect "the balance" from respondents at San Francisco. He does not claim that Mr. Cook expressly agreed to pay any railroad charge. He further testified (p. 29) that, in accordance with Mr. Cook's request, he sent a telegram on November 6th, directing the agent at San Diego to so deliver the grain, "turning in relief voucher "for *storage and balance freight rate* to be collected from" respondents.

The testimony of this witness shows (pp. 31–34) that, at no time during these negotiations, did he know or state to respondents that there would, in fact, be any

such railroad charge, nor, if any should be found to exist, how much it would be.

Mr. H. W. Goodall, for libelant, corroborated Mr. Cooper as to the conversation with Mr. Cook on November 3d.

This was all the testimony for libelant as tc the contract between the parties.

Mr. Ferguson, for respondents, testified (pp. 43–61) that he had several conversations on the subject with Mr. Cooper on October 26th and 27th. The substance of these conversations was this: He informed Mr. Cooper that, having had an inquiry for barley from the Howard company, he had found a lot at Moss Landing which had been quoted to him at a price f. o b. there, which lot would be available "if a rate could be ob- "tained by which it could be shipped." Mr. Cooper stated that the rate would be $3.10 per ton, and refused to give a reduction to $2.50,— the Howard special rate from San Francisco. Thereupon respondents closed the trade for the grain with Waterman & Co., but did not then pay them or receive the warehouse receipt. Mr. Ferguson then had a further conversation with Mr. Cooper, in which he informed him that he had purchased the grain on the basis of the quoted freight rate of $3.10, and requested Mr. Cooper to deliver it at San Diego on the payment of $2 50, agreeing that respondents would pay the difference of 60 cents. Mr. Cooper assented to this, but stated that there might be some "back charges" on the grain. Thereupon respondents procured the warehouse receipt, which showed a storage charge of 25 cents, and settled with Water-

man & Co. on that basis, deducting that amount from the purchase price. Mr. Ferguson then informed Mr. Cooper that he had obtained the warehouse receipt, and that it showed that the back charge was 25 cents per ton, which would make the total amount to be paid by respondents 85 cents per ton. To this Mr. Cooper assented. Respondents then sent the warehouse receipt to Mr. Cooper, and the grain went forward as before stated.

Mr. Cook, for respondents, testified (pp 63-84) as to several conversations between himself and Mr. Cooper. The material points were these : On October 26th, Mr. Cooper informed him that he had arranged with Mr. Ferguson to deliver the grain at San Diego for $2.50 and collect the balance of 60 cents from respondents. On October 27th he informed Mr. Cooper that there was a charge of 25 cents for storage shown by the warehouse receipt, and gave him a written memorandum showing the amount of barley, and specifying that respondents were to pay 60 cents per ton difference in freight and 25 cents per ton storage, on demand after shipment. Mr. Cooper made no objection. On October 29th he handed Mr. Cooper the warehouse receipt. On November 3d, after the sailing of the vessel, no bill for their indebtedness having been presented to respondents, Mr Cook, fearing that the bill might have gone forward to the Howard company, called on Mr. Cooper and requested him to telegraph his agent at San Diego. Mr. Cooper then, for the first time, spoke of possible back charges. Mr. Cook said that the warehouse receipt specified the back charges as 25 cents per ton. Mr. Cooper then

said there might be railroad charges from Blanco. Mr. Cook replied that there could be no such charge, because it was not specified in the receipt. After some discussion, Mr. Cook still persisting that the terms of the receipt must govern, Mr. Cooper agreed to telegraph as requested. Up to that time neither of respondents had heard anything about railroad charges, nor did they at any time know where this grain originated, nor what arrangements there were between the railroad company and libelant. (Pp. 33, 55, 73.)

It will be seen that respondents were purchasing this grain under circumstances which made it necessary for them to know, in advance, what it would cost, that they so informed libelant, and that they purchased the grain on the faith of their understanding with libelant. The fact that Mr. Cooper, on November 3d, informed Mr. Cook that there might be railroad charges, is therefore entirely immaterial. The grain had already been purchased and shipped, and the contract, whatever it was, was then complete. It is not claimed that Mr. Cook agreed, in terms, to pay any railroad charge, and notice to him of its possible existence was unimportant at that time. The whole question, then, turns on the conversations with Mr. Ferguson. Mr. Cooper says that he told Mr. Ferguson that there might be railroad charges. Mr Ferguson denies this, and says that all Mr. Cooper said was "back charges." Now, there is nothing in the world to corroborate Mr. Cooper; but the circumstances strongly suggest the probability of Mr. Ferguson's statement. It is not credible that a business man would purchase grain, as this was being purchased, subject to

a lien of wholly unknown extent. Mr. Ferguson had already stated to Mr. Cooper that the question of the purchase of the grain depended upon the terms he could secure from libelant; and it is not to be believed that, after being informed of a possible charge of an indefinite amount, he would have purchased the grain without a definite adjustment. When Mr. Cooper told him there might be back charges, he went and examined the warehouse receipt. Finding there a charge of 25 cents for storage, he assumed, and had the right to assume, (the receipt being negotiable,) that this was the only charge; and he purchased the grain on that basis. His testimony, being in accord with the probabilities of the case, is therefore to be preferred to that of Mr. Cooper.

Another significant circumstance in the case is the fact that libelant, though challenged to do so, (pp. 35–6,) was wholly unable to specify a single instance in which it had ever exacted any payment of any railroad charge from the owner of goods stored in the Moss Landing warehouse. Certain manifests and other entries (pp. 84–95) were produced in response to our challenge; but in each case, except that of the grain in controversy in this suit, the goods were shipped direct to San Diego from a point on the railroad, and were never in libelant's warehouse. It must, therefore, be taken as a fact, that in no case, other than the present one, has any such charge been made. It would indeed, seem highly improbable that such an attempt to repudiate the obligations of a negotiable warehouse receipt would not meet resistance at the outset. It is, therefore, at least probable that this charge was an afterthought; and, at

any rate, this circumstance is sufficient to cast a doubt on the reliability of Mr. Cooper's testimony.

But, even if we should assume every word of his testimony to be true, it does not prove any contract to pay this alleged charge. As we have before said, it is not claimed that respondents ever expressly agreed to pay it. The claim is that, from the alleged fact that they were notified of the possibility of such a charge, an agreement to pay it must be inferred. Such an inference might, perhaps, be drawn, if they had been informed that there *was* such a charge, which they would have to pay. But, when they were told (if they were told) that there might possibly be such a charge, they had an absolute legal right to assume that, if there were any, it would be specified on the receipt. Finding no such charge on the receipt, they had an absolute legal right to rely on its non-existence. The receipt did not even show that the grain had ever been over any railroad, and it expressly provided that the goods might be withdrawn from the warehouse, for local use or consumption, upon payment merely of the specified storage charges. It is not claimed that respondents were informed that there might be a charge *not specified in the receipt;* and therefore they had no notice of anything contradicting the receipt. Indeed, the receipt is made conclusive by statute, and libelant could not be permitted to contradict it.

Stats. Cal. 1877–8, 949 ; Secs. 5, 6, 8; (for which see appendix to this brief);

Bishop v. *Fulkerth*, 68 Cal. 607.

This receipt, in the hands of Waterman & Co., its indorsees without notice, was unquestionably conclusive. Their agreement to deliver the grain, f. o. b., was fully satisfied by their transfer of the receipt and the deduction, by them, of the charges therein stated, from the purchase price. Under such circumstances, respondents would have no recourse on Waterman & Co., and it is absurd to suppose that they would have purchased the grain with an unascertained charge upon it. At any rate, as no express agreement to pay any such charge was proved or claimed to exist, no such agreement can be inferred from the facts testified to by Mr. Cooper.

VI.

The demand in controversy is not admitted by the answer.

Counsel for libelant contends that the admission in the answer of the allegations of the fourth article of the libel, amounts to an admission of the allegations of the third article as to the contract. As the allegations of the third article are expressly denied, (pp. 12, 13,) a mere failure to deny them a second time cannot amount to an admission. Even if those allegations had been repeated in the fourth article, it would not have been necessary to repeat the denials. But they are not so repeated. The allegations of the latter article are merely as to the delivery of the freight and the part payment of $2.50 per ton; and the recitals that the delivery was "in full compliance with the agreement above stated," and that the payment was "pursuant to the agreement," are not new allegations of the fact of the contract, but

mere averments that, as matter of law, the delivery and payment were such as were required by the contract previously alleged. These averments might be, and were in fact, true, even although no such contract had ever been made. Respondents' answer, denying the contract, but admitting these latter averments, was therefore strictly correct.

Moreover, libelant, on the trial, treated the allegations as to the contract as denied, and introduced proof in support of them; and it cannot now be heard to claim that they were admitted.

VII.

THE DECREE PROPERLY AWARDED COSTS TO RESPONDENTS.

The libel in this case alleged a contract strictly and purely maritime, and a breach of that contract. The District Court, therefore, acquired jurisdiction of the libel. The answer denied the contract as alleged, admitted a contract for a less sum, and averred payment of part of that sum and tender of the residue. On the face of the pleadings, then, an issue was formed on a maritime question, and, on the determination of *that issue* in favor of respondents, they would, of course, be entitled to costs.

On the trial, libelant departed from the allegations of its libel, and undertook to prove, not a maritime contract for the payment of $4.35 per ton, but, at best, the maritime contract for $3.10 per ton admitted by respondents, and another and non-maritime contract for $1.25 per ton. As to the contract for $3. 0 per ton, the defenses of payment and tender were complete, and,

being proved to be true, entitled respondents to a judgment in their favor, so far as that issue was concerned. As to the alleged contract for $1.25 per ton, the court had no jurisdiction. It could not determine whether such a contract was made or not. When, therefore, it was proved that respondents had paid or tendered all that could be recovered from them in that forum, they were clearly entitled to their costs; and the court could not withhold costs because it was unable to determine whether or not respondents were indebted to libelant on some other account not within the court's jurisdiction. On the only matter within the jurisdiction of the court, the respondents proved a perfect defense, and the decree was therefore right.

It may be remarked that counsel's statement that the tender was made in full of all demands, is incorrect. The tender was in writing, (pp. 72, 73,) and was expressly made upon the demand of $3.10 for sea freight and 25 cents for storage As it was sufficient to satisfy those demands, it was not material for the court to inquire, and it had no jurisdiction to inquire, whether or not libelant had another and non-maritime demand.

We have discussed this case at much greater length than its pecuniary consequence demands; for which we hope that the importance of the principal question will be our excuse.

We respectfully submit that the decree should be affirmed.

E. B. & GEO. H. MASTICK,
For Appellees.

APPENDIX.

Extracts from Statute of California of April 1, 1878, (*Stats.* 1877–8, 949,) referred to on page 36 of this brief.

SEC. 5. Warehouse receipts for property stored shall be of two classes: First, transferable or negotiable; and second, non-transferable or non-negotiable. Under the first of these classes, all property shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement of the party shall be deemed a valid transfer of the property represented by such receipt, and may be in blank or to the order of another. All warehouse receipts for property stored shall distinctly state on their face for what they are issued, as, also, the brands and distinguishing marks; and in the case of grain, the number of sacks, and number of pounds, and kind of grain; also, the rate of storage per month or season charged for storing the same.

SEC. 6. No warehouseman, or other person or persons, giving or issuing negotiable receipts for goods, grain, or other property on storage, shall deliver said property, or any part thereof, without indorsing upon the back of said receipt or receipts, in ink, the amount and date of the deliveries. *Nor shall he or they be allowed to make any offset, claim, or demand other than is expressed on the face of the receipt or receipts issued for the same, when called upon to deliver said goods, merchandise, grain, or other property.*

SEC. 8. All receipts issued by any warehouseman or other person under this Act, other than negotiable, shall have printed across their face in bold distinct letters, in red ink, the words non-negotiable.

No. 288.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY,
Appellant,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY and ANNIE RASKEY, his Wife, and RICHARD A. BELLINGER,
Appellees.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States,
for the District of Washington,
Northern Division.

INDEX.

In the United States Circuit Court, Northern Division.

IN THE MATTER OF THE RECEIVERSHIP OF THE SEATTLE LAKE SHORE RAILROAD COMPANY,

and

PETER G. LONGWORTH, ET AL.,

Petitioners,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, ET AL.,

Defendants.

Notice.

To the Defendants, the Seattle Lake Shore and Eastern Railroad Company, The Northern Pacific Railroad Company, Henry Ives, Henry Rouse and H. C. Payne, Receivers, and to Andrew F. Burleigh, their Attorney:

You and each of you will please take notice that the petitions in the above-named causes, will be called up for hearing and determination before the Hon. C. H. Hanford, Judge of the above-entitled court, at his courtroom in the Colman Block, Seattle, King county, at the hour of ten o'clock A. M. of the 10th day of August, or as soon thereafter as counsel can be heard.

JAMES HAMILTON LEWIS,

Attorney for Petitioners.

In the United States Circuit Court, Northern Division. Holding Court at Seattle.

PETER G. LONGWORTH, RICHARD A. BELLINGER AND MICHAEL RASKEY,
Petitioners,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, HENRY IVES, HENRY ROUSE and H. C. PAYNE, Receivers,
Respondents.

Petition.

I.

Your petitioner, Peter G. Longworth, petitions and informs the Court that upon a cause of action duly stated against the defendant, The Northern Pacific Railroad Company, he did recover a judgment for the sum of $3,000, together with costs, $164.69, which judgment was recovered on October 30th, 1893, with interest, to-wit, of about the amount of $240; that said judgment has been duly recorded and the defendant duly notified of the same, and that the same became a lien in favor of petitioner from the date of October 30, 1893, and is duly entered in volume one of the Journal, page 79 of the Register of Judgments of this Honorable Court.

II.

And your petitioner, Richard A. Bellinger, informs the Court that upon a due cause of action duly stated, he did recover of and against the defendant, The Northern Pacific Railroad Company, judgment on October 24th, 1883, for $1500, together with interest from said date at eight per cent, amounting to about $100, together with costs in the sum of $16.50; which said judgment is recorded in volume one, page 77 of the Register of Judgments.

III.

And your petitioners, Michael Raskey and wife, petition the Court and inform the Court that they duly recovered in a due cause of action against The Northern Pacific Railroad Company, a judgment for the sum of $500, and costs $220.26, with interest amounting to about $50, which said judgment was duly recorded in volume one, page 80 of the Register of Judgments.

IV.

That all of said judgments were duly notified to the defendant, and the said suits were brought and pending previous to the defendant going into the hands of a receiver, and since said judgments have become and are liens in favor of petitioners and against the defendant.

V.

That frequent and constant demands for the payment of the said judgments have been made upon the defendant, but the same have been wholly ignored, and the said receivers of the defendant wholly ignore the same.

VI.

That the reports of The Northern Pacific Railroad Company and the said receivers show that the said road is earning complete and sufficient sums to defray all expenses of its operation, leaving a balance due to the credit of the said receivers to be applied to the payment of such debts as are matured and due; that from the report of the said Northern Pacific receivers, made in their last report submitted to the Court, said report being filed in the city of Milwaukee and in the city of St. Paul, there appears a large sum, to-wit, more than $180,000 as a net return, after the payment of expenses, for the first quarter after April 1st, 1894; that the said report further discloses that the said company has assets far in excess of all debts and liabilities, to the amount of, in the said excess, of three and a half million dollars; that notwithstanding such report, the said receivers refuse to pay the said judgments or any part thereof.

VII.

That the judgments herein referred to are hereby evidenced by a certified transcript from this Hon. Court marked Exhibits A, B, and C.

Wherefore, petitioners pray that your Honor will order the said auditor of the said receivers to audit and pay said judgments to these petitioners within the period of not more than thirty days; that upon the failure so to do your Honor will permit petitioners to issue execution out of this Hon. Court, and the same to be levied against the lands and tenements and properties of the said defendant

sufficient to pay the said judgments, costs and interest. And your petitioners will ever pray.

JAS. HAMILTON LEWIS,
Attorney for Petitioners.

Copy of within notice received and due service of the same acknowledged this 9th day of August, 1894.

A. F. BURLEIGH,
Attorney for S. L. S. & E. Ry.

[Endorsed]: Petition filed Aug. 11,1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

THE FARMERS' LOAN AND TRUST COMPANY, vs. THE NORTHERN PACIFIC RAILROAD COMPANY, ET AL.	No. 337.

Order.

And now on this 16th day of August, 1894, on consideration of the petition of Peter G. Longworth, Richard Bellinger, and Michael Raskey and wife, it is ordered, by the Court that the receivers of The Northern Pacific Railroad do, within the next thirty days, pay the several amounts due to the petitioners upon the judgments in their favor, or deposit with the Clerk of this court, receiver's certificates for said amounts. Such certificates to be redeema-

ble in cash in six months from the date of issue and to bear interest at the rate of eight per cent per annum from date until paid.

C. H. HANFORD,
Judge.

[Endorsed]: Order filed August 16th, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

THE FARMERS' LOAN AND TRUST COMPANY,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, ET AL. } No. 337.

Motion for Order Extending Time.

Comes now the above-named Farmers' Loan and Trust Company and moves the Court for an extension of thirty days' time from the 16th day of September, 1894, in which to show cause why that certain order made in the above court and cause on August 16, 1894, wherein it was ordered that the receivers of said Northern Pacific Railroad Company do within thirty days from the date of said order pay to Peter G. Longworth, Richard A. Bellinger and Michael Raskey and wife, the amount of certain judgments in their favor, or deposit with the Clerk of said court, receivers' certificates to be redeemable in cash in six months from the date of issue, and to bear interest at the

rate of eight per cent per annum, should be vacated or modified so as not to require the issuance of said receivers' certificates, for the following reasons among others:

That no proceedings were ever had upon which said order is based wherein said Farmers' Loan and Trust Company was or is a party, or was served with any notice of the application for said order or was ever given any notice of the proceeding upon which the said order was based, because said order was made without the said Farmers' Loan and Trust Company being in any manner a party to said proceedings and because it never consented to the same, and because said order is in violation of the prior vested contract rights of the said Farmers' Loan and Trust Company, and tends to impair the value of its mortgage security on all the properties of said Northern Pacific Railroad Company, subsisting at and prior to the date of said order. This motion is based upon the record in said matter and upon the affidavit hereto annexed.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for the Farmers' Loan and Trust Company.

In the Circuit Court of the United States for the District of Washington, Northern Division.

THE FARMERS' LOAN AND TRUST COMPANY,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, ET AL. } No. 337.

Affidavit of Maurice McMicken.

State of Washington, }
County of King. } ss.

Maurice McMicken being duly sworn says he is one of the attorneys of the above-named Farmers' Loan and Trust Company; that said company is a corporation duly organized and existing under the laws of the State of New York; that prior to the making of said order and the incurring of the liabilities upon which the several judgments of said Peter G. Longworth, Richard A. Bellinger and Michael Raskey and wife were rendered, the said Northern Pacific Railroad Company executed and delivered to said Farmers' Loan and Trust Company its certain mortgages, conveying all and singular the properties, real and personal, and of every character and nature whatsoever, of the said Northern Pacific Railroad Company, to secure the payment of the bonds of said Railroad Company issued, to the amount of many millions of dollars, and which said mortgages are not more than adequate security for the payment of the same; that if, as affiant is informed and believes, the said order remains and the

said receivers are required agreeably thereto to issue certificates, the same will become a precedent for a large number of claims and demands of a similar character, and that the effect thereof is to impair and prejudice the said mortgage securities, and for that reason said Trust Company asks that it be afforded an opportunity to show cause why the said order should be vacated or modified.

MAURICE McMICKEN.

Subscribed and sworn to before me this 12th day of September, 1894.

[Notarial Seal] H. J. RAMSEY,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Motion and Affidavit. Filed Sept. 15, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

THE FARMERS' LOAN AND TRUST COMPANY, ET AL., vs. THE NORTHERN PACIFIC RAILROAD COMPANY, ET AL.	No. 337.

Order Extending Time to Show Cause.

On motion of said Farmers' Loan and Trust Company for an extension of thirty (30) days time from September 16th, 1894, in which to show cause why that certain order

made in the above court and cause August 16th, 1894, ordering that the receivers of said Northern Pacific Railroad Company within thirty days from said date pay Peter Longworth, Richard A. Bellinger and Michael Raskey and wife the amount of certain judgments in their favor, or deposit with the Clerk of said court, receivers' certificates to be redeemable in six months from the date of their issue, it is ordered that such extension of time to show cause be and the same is hereby given until October 3rd, 1894, and that all further proceedings in said matter be suspended until the further order of the Court.

Dated September 17th, 1894.

C. H. HANFORD,

Judge.

[Endorsed]: Order Extending Time to Show Cause. Filed Sept. 17, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

THE FARMERS' LOAN AND TRUST COMPANY,
Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, ET AL.,
Defendants.

Motion to Vacate Order.

To the above-named plaintiff, and its attorneys, Messrs. Struve, Allen, Hughes & McMicken:

You, and each of you will please take notice, that the

petitioners herein, Peter Longworth, Richard Bellinger and Michael Raskey, by their attorneys, Stratton, Lewis & Gilman, will, on the 20th day of November, 1894, at the hour of ten o'clock A. M., on said date, or as soon thereafter as counsel can be heard, call up for hearing and determination, before the Hon. C. H. Hanford, Judge of the above court, at his courtroom in the Colman Block, Seattle, Washington, plaintiff's motion to set aside the order of the Court heretofore entered, granting judgment and precedence in the case of Longworth et al., against The Northern Pacific Railroad Company.

Nov. 16, 1894.

STRATTON, LEWIS & GILMAN,
Attorneys for Petitioners.

[Endorsed]: Notice. Filed Nov. 19, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Copy of within notice received and due service of the same acknowledged this 16th day of Nov., 1894.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Plaintiffs.

In the United States Circuit Court, for the District of Washington, Northern Division.

THE FARMERS' LOAN AND TRUST COMPANY,
Complainant,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY ET AL.,
Defendants.
No. 337.

Order Denying Motion to Vacate, etc.

This cause having come on duly and regularly to be heard upon the motion of the complainant, the Farmers' Loan and Trust Company, to vacate and set aside the order made by the Court herein on the 16th day of August, 1894, directing that the receivers of The Northern Pacific Railroad Company, within thirty days from the date of said order, pay the amounts of the judgments of Peter G. Longworth, Michael Raskey and Annie Raskey, his wife, and R. A. Bellinger, against The Northern Pacific Railroad Company, or deposit with the Clerk of this court, receivers' certificates for the amounts of said judgments, such certificates to be redeemed in cash in six months from the date of issue, and to bear interest at the rate of eight per cent per annum from date until paid, and the Court having heard the arguments of counsel of the parties hereto thereon, and having taken the same under advisement, and being now fully advised in the premises,

It is ordered that said motion to vacate and set aside

said order be, and the same hereby is denied; and it is ordered that said order be modified in this, to-wit, that the receiver of The Northern Pacific Railroad Company be directed, on or before the 31st day of December, 1895, to pay the amount of said judgments, together with costs, without interest, in cash; and Andrew F. Burleigh, receiver of the defendant, The Northern Pacific Railroad Company, is hereby directed and ordered to pay to the Clerk of this court, on or before the 31st day of December, 1895, the amounts of the judgments, together with costs, in cash, but without interest, of Peter G. Longworth, Michael Raskey and Annie Raskey, his wife, and R. A. Bellinger; the judgment of Peter G. Longworth being for the sum of three thousand dollars ($3000.00) and costs of suit; the judgment of Michael Raskey and Annie Raskey, his wife, being for five hundred dollars ($500.00) and costs of suit, and the judgment of R. A. Bellinger being for fifteen hundred dollars ($1500.00) and costs of suit.

To the foregoing order, and each and every part thereof, complainant by its counsel duly excepts and its exception is allowed by the Court.

Done in open court this 18th day of December, A. D., 1895.

C. H. HANFORD,
Judge.

[Endorsed]: Order Filed Dec. 18, 1895, in U. S. Circuit Court. A Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

In Equity.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York,

Complainant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, and ANDREW F. BURLEIGH, as Receiver of The Northern Pacific Railroad Company,

Defendants.

No. 337.

Order Granting Leave to Farmers' Loan and Trust Co. to File Answer.

In the matter of the Petition of Peter G. Longworth, Richard A. Bellinger and Michael Raskey.

Now, on this 6th day of January, 1896, in open court, comes The Farmers' Loan and Trust Company, by its solicitors, Struve, Allen, Hughes & McMicken, and applying to the Court to be permitted to make and file its intervening answer herein, as of the date of October 10th, 1894, to the petition of the said petitioners, Peter G. Longworth, Richard A. Bellinger and Michael Raskey in the above matter, upon which the order of this Court of August 16th, 1895, was based, directing that the receivers of The Northern Pacific Railroad Company, within thirty days next

after said 16th day of August, pay the said several amounts alleged to be due on the judgments in their favor, or deposit with the Clerk of this court, receivers' certificates as in said order required, to the end that the issues argued by counsel and upon which said matter was heard and determined by the Court may fully appear in the pleadings and record of this matter, viz., as to whether the respective claims of said petitioners are operating expenses of said Northern Pacific Railroad Company of such a character as to have precedence over and be a superior lien upon the income of the said Northern Pacific Railroad Company in the hands of its receivers over the lien of the mortgages of said Northern Pacific Railroad Company to the Farmers' Loan and Trust Company, as trustee in this proceeding, as is more fully set forth in the answer hereby sought to be filed; and counsel having been heard on behalf of said application, and L. C. Gilman, of counsel for said petitioners, having been heard in opposition thereto, and the Court being fully advised in the premises, for the reasons above set forth grants said application, and it is ordered that the said Farmers' Loan and Trust Company be and it is permitted at this time to file its answer herewith presented as and of the 10th day of October, 1894, and the same is filed accordingly.

C. H. HANFORD,
Judge.

[Endorsed]: Order Granting Leave to file Answer *nunc pro tunc*. Filed Jan. 20, 1896, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By E. A. Colvin, Deputy.

In the United States Circuit Court, District of Washington, Northern Division.

PETER G. LONGWORTH, RICHARD A. BELLINGER and MICHAEL RASKEY,
Petitioners,
vs.
HENRY IVES, HENRY ROUSE and H. C. PAYNE,
Respondents.

Intervention of Farmers' Loan and Trust Company.

To the Honorable Judges of the United States Circuit Court, District of Washington, Northern Division:

In obedience to the permission of the Court upon its application therefor heretofore given, the intervening petitioner, The Farmers' Loan and Trust Company, appears in the above proceeding and makes its answer to the petition of said petitioners and shows cause why the order of said Court made and entered in said proceeding on the 16th day of August, 1894, in favor of the said petitioners, whereby it was by the Court ordered that the receivers of The Northern Pacific Railroad Company, within thirty days next after said 16th day of August, pay the several amounts alleged to be due the said petitioners upon judgments in their favor, or deposit with the Clerk of this court, receivers' certificates, as in said order required, answereth as follows:

And thereupon your intervening petitioner complains and says:

I.

That your petitioner is a corporation bearing the name of The Farmers' Loan and Trust Company, duly created under the laws of the State of New York, and as such corporation fully authorized to hold in trust the property conveyed to it in trust as hereinafter stated.

II.

The defendant, Northern Pacific Railroad Company, herein called Mortgagor Company, is a corporation created and existing under certain laws of the United States, to-wit, an act of the congress of the United States, entitled "An Act Granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," approved by the President of the United States on the 2nd day of July, A. D. 1864, and the amendments to the said act, and joint resolutions of the congress of the United States supplemental thereto, and certain acts of the legislatures of the States of Minnesota, Wisconsin and Oregon. And your orator begs leave to refer to each and every of said acts and joint resolutions and make them a part of this petition in intervention the same as if fully incorporated herein.

III.

That pursuant to the said several acts and joint resolutions above referred to, defendant Mortgagor Company has constructed and now maintains and operates its mail line of railroad and Cascade Branch and telegraph lines from a point on Lake Superior, in the State of Wisconsin,

at or near the city of Ashland, to its termini at Tacoma, on Puget Sound, in the State of Washington, and at Portland, in the State of Oregon.

IV.

That the defendant, the Mortgagor Company, under and by virtue of said acts of congress of the United States, and amendments and joint resolutions, and by virtue of its said incorporation became and is the owner of large quantities of land granted to it by the said congress of the United States, and now seized and possessed of said lands, and of an extensive mileage of railroads with their rolling stock, equipments and appurtenances, all of which are subject to the liens of certain mortgages as hereinafter stated.

V.

That on the 20th day of November, 1883, defendant Mortgagor Company, for the purpose of securing the payment of a series of bonds of said company, executed, acknowledged and delivered, as party of the first part, to your intervening petitioner, the Farmers' Loan and Trust Company, as trustee, its mortgage or deed of trust known as its General Second Mortgage, wherein and whereby it conveyed and transferred to your intervening petitioner, and to its successor, or successors and assigns, all the following property and premises, to-wit:

All and singular, the railroad and telegraph line or lines of the said Mortgagor Company, constructed, being constructed or thereafter to be constructed, including its main line and all branch lines and all lands, tenements and hereditaments acquired or appropriated or thereafter to be acquired or appropriated for any purposes connected

with the said main line,, or branches, and everything appertaining to or incident to the said main line or branches, or used or designed to be used or enjoyed in connection therewith, together with all rolling stock and equipment then and thereafter to be acquired, and all lands contained within the said grants by the congress of the United States, or otherwise acquired, owned or possessed by said Mortagor Company or thereafter to be so acquired, and all privileges, immunities and franchises connected with or in any wise relating to said lines of railroad and lines of telegraph, or thereafter to be acquired or connected therewith, and all other corporate franchises of every nature, owned by or connected with said Mortgagor Company, including its franchises to be a corporation, and all and singular all other property or rights of property of every kind and nature whatsoever, then or thereafter to be acquired by said Mortgagor Company wheresoever situate, held or used by it, together with all the income, earnings and profits of said main line and branches of said railroad company, and of all and every of the property of the said railroad company of every nature and description as will more fully and completely appear by said mortgages to which reference is made.

VI.

The said General Second Mortgage was made and was therein expressly recited as made, subject only to the prior lien of the General First Mortgage of said Mortgagor Company bearing date January 1st, 1881.

VII.

The said General Second Mortgage was made to secure a series of General Second Mortgage bonds dated Decem-

ber 1st, 1883, each for the sum of one thousand dollars, aggregating twenty million dollars of principal, payable on the first day of December, 1933, in United States gold coin, and interest thereon in the meantime, at the rate of six per cent per annum, payable in like gold coin, semi-annually, on the first day of April, and on the first day of October in each year, upon presentation and surrender of certain coupons or interest warrants thereto annexed, as they might severally respectfully mature. Upon each of said bonds there was a certificate by said, The Farmers' Loan and Trust Company, stating that said bond was secured by the mortgage therein mentioned, being the General Second Mortgage above described, all of which by the said bonds and each of them, and the said certificates thereon, to which your petitioner for greater certainty refers will more fully and at large appear.

VIII.

That said General Second Mortgage was and is the proper act and deed of the said Mortgagor Company, by it authorized, made and delivered in all respects in conformity with law; that the same was duly acknowledged and recorded in the office of the Secretary of the Interior at Washington, District of Columbia, and the same is a valid conveyance for the purposes therein stated. That the trusts therein and thereby created were duly accepted by said Farmers' Loan and Trust Company, the intervening petitioner, before the recording of the said General Second Mortgage as aforesaid.

IX.

That under and by virtue of the provisions of said General Second Mortgage there was duly certified in the form

set forth therein, 20,000 of the bonds therein mentioned and described in said mortgage, and to secure which the same was executed and delivered as aforesaid, aggregating $20,000,000 of principal, and a large number of said bonds, to-wit, 19,216 are outstanding and existing obligations on the part of said Mortgagor Company, and the remainder, to-wit, 784 bonds have been retired by the action of the sinking fund, and are now held in said sinking fund under the provisions of said mortgage.

X.

That afterwards and on the first day of December, 1887, for the purpose of securing the payment of a further series of bonds of said Mortgagor Company, said Mortgagor Company executed, acknowledged and delivered to your intervening petitioner, The Farmers' Loan and Trust Company, as trustees, its certain other mortgage or deed of trust known as its General Third Mortgage, wherein and whereby it conveyed and transferred to your orator, and to its successor or successors and assigns, all the following premises and property:

All and singular, the railroad and telegraph line or lines of the said Mortgagor Company, constructed, being constructed or thereafter to be constructed, including its main line and all branch lines and all the lands, tenements and hereditaments acquired or appropriated or thereafter to be acquired or appropriated for any purposes connected with the said main line, or branches, and everything appertaining to or incident to the said main line or branches, or used or designed to be used or enjoyed in connection therewith, together with all rolling stock and equipments then and thereafter to be acquired,

and all lands contained within the said grants by the rongress of the United States, or otherwise acquired, owned or possessed by said Mortgagor Company, or thereafter to be so acquired, and all privileges, immunities and franchises connected with or in any wise relating to said lines of railroad and lines of telegraph, or thereafter to be acquired or connected therewith, and all other corporate franchises of every nature, owned by or connected with said Mortgagor Company, including its franchise to be a corporation, and all and singular, all other property or rights of property of every kind and nature whatsoever, then or thereafter to be acquired by said Mortgagor Company wheresoever situate, held or used by it, together with all the income, earnings and profits of said main line and branches of said railroad company, and of all and every of the property of the said railroad company of every nature and description as will more fully and completely appear by said mortgages to which reference is made.

XI.

The said General Third Mortgage was made as subject to the lien of said prior mortgages above recited, and the bonds issued and to be issued thereunder.

XII.

The said General Third Mortgage was made to secure a series of General Third Mortgage bonds, dated December 1st, 1887, for one thousand dollars each, aggregating twelve millions of dollars of principal, payable on the first day of December 1937, in United States gold coin, and interest thereon in the meantime at the rate of six per cent per annum, payable in like gold coin semi-annu-

ally on the first days of June and December in each year, as by the coupons thereto attached appears. Each of said bonds was duly certified and recited that they were secured by said General Third Mortgage.

XIII.

The said General Third Mortgage was the proper act and deed of said Northern Pacific Railroad Company made and delivered in conformity with law, and was duly recorded in the office of the Secretary of the Interior at Washington, in the District of Columbia, and the same is a valid conveyance for the purposes therein stated. The trusts therein and thereby created were accepted by your intervening petitioner, The Farmers' Loan and Trust Company before the recording of the said General Third Mortgage as aforesaid. That under and by virtue of the provisions of the said General Third Mortgage there was duly certified 11,461 of the bonds mentioned and described in said mortgage, and to secure which the same was executed and delivered, aggregating $11,461,000 of principal; and all of said bonds so certified are outstanding and existing obligations on the part of said Northern Pacific Railroad Company.

XIV.

That afterwards and on December 2nd, 1889, the said Mortgagor Company, Northern Pacific Railroad Company, for the purpose of securing the payment of a further series of bonds of said company, executed, acknowledged and delivered to the Farmers' Loan and Trust Company, as trustee, your intervening petitioner, its certain other mortgage or deed of trust known as its Consolidated Mort-

gage, wherein and whereby it conveyed and transferred to said Trust Company, its successors and assigns all the following property and premises, to-wit:

All and singular the railroad and telegraph line or lines of said Mortgagor Company, constructed, being constructed or thereafter to be constructed, including its main line and all branch lines and all the lands, tenements and hereditaments acquired or appropriated or thereafter to be acquired or appropriated for any purposes connected with the said main line, or branches, and everything appertaining to or incident to the said main line or branches, or used or designed to be used or enjoyed in connection therewith, together with all rolling stock and equipments then and thereafter to be acquired, and all lands contained within the said grants by the congress of the United States, or otherwise acquired, owned or possessed by said Mortgagor Company or thereafter to be so acquired, and all privileges, immunities, and franchises connected with or in any wise relating to said lines of railroad and lines of telegraph, or thereafter to be acquired or connected therewith, and all other corporate franchises of every nature, owned by or connected with said Mortgagor Company, including its franchise, to be a corporation, and all and singular all other property or rights of property of every kind and nature whatsoever, then or thereafter to be acquired by said Mortgagor Company wheresoever situate, held or used by it, together with all the income, earnings, and profits of said main line and branches of said railroad company, and of all and every of the property of the said railroad company of every nature and description as will more fully and more com-

pletely appear by said mortgage to which reference is made.

XV.

That said Consolidated Mortgage was so made as aforesaid to secure a series of consolidated mortgage bonds of said Northern Pacific Railroad Company, dated December 2nd, 1889, each for the sum of one thousand dollars, not to exceed in the aggregate $160,000,000 payable on the first day of December, 1987, in United States gold coin, with interest thereon in the meantime at a rate not to exceed five per cent per annum, payable in like coin semi-annually on the first days of June and December in each year, each of which bonds was certified that it was one of the bonds secured by and named in said Consolidated Mortgage.

XVI.

That said Consolidated Mortgage was and is the proper act and deed of said Northern Pacific Railroad Company, by it authorized, made, and delivered in all respects in conformity with law; and the same was duly recorded in the office of the Secretary of the Interior, at Washington, in the District of Columbia, and the trusts therein created were duly accepted by said Trust Company.

XVII.

That under the provisions of said Consolidated Mortgage your orator, upon being requested so to do, certified, in the form set forth therein, 62,443 of the bonds mentioned and described in said mortgage, and to secure the same was executed and delivered as aforesaid, aggregating $62,443,000 of principal; that a large number of said bonds, so far as this intervening petitioner knows, all of

them are outstanding and existing obligations on the part of The Northern Pacific Railroad Company.

XVIII.

That default having been made in the payment of interest due on said Consolidated Mortgage for June 1st, 1893, and the said Mortgagor Company, Northern Pacific Railroad Company, having become insolvent, such proceedings were had that in the above-entitled court on or about the 30th day of October, 1893, an order was duly made and entered whereby it was ordered that Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, theretofore appointed receivers of said Northern Pacific Railroad Company and its property, were duly appointed receivers in that certain cause wherein the Farmers' Loan and Trust Company, was complainant and said Northern Pacific Railroad Company et al., were defendants, that said respondents, receivers, qualified and entered upon their duties as such, and that their duly appointed successor, A. F. Burleigh, is now such receiver administering said property.

XIX.

That in the above-entitled matter wherein said order of August 16, 1894, was entered for the payment of the demands of said petitioners or the issuance of receivers' certificates on failure of such payment, your said intervening petitioner, The Farmers' Loan and Trust Company, was not made a party, nor was it in any manner notified of said proceedings, nor was it present in said court and it did not in any manner consent to said order or waive notice or right to be heard therein.

XX.

It admits that on the 30th day of October, 1893, a judgment in the sum of $3,000 with costs of $164.69 was recovered in favor of said petitioner, Peter G. Longworth, in this court, in a certain action wherein said Peter G. Longworth was plaintiff and said Northern Pacific Railroad Company was defendant; that said judgment was recorded as in said petition set forth on the 30th day of October, 1893, but avers that said judgment was recovered in a certain action commenced in said court June 19, 1891, upon a verdict therein rendered October 16, 1893, for personal injuries resulting to said Longworth as a passenger on the passenger train of said Northern Pacific Railroad Company occurring through the negligence of said Northern Pacific Railroad Company.

XXI.

It admits that said petitioner Richard A. Bellinger recovered the judgment of $1500 and costs on October 24, 1893, set forth in said petition, and that said judgment was recorded as alleged, but avers that said judgment was recovered in an action upon a contract between said Bellinger and The Northern Pacific Railroad Company for the payment of certain sums and the performance of other conditions in settlement of personal injuries received by him as an engineer of The Northern Pacific Railroad Company, January 16, 1888, through the carelessness of said company.

XXII.

It admits that Michael Raskey and his wife recovered judgment as in the petition alleged against The Northern

Pacific Railroad Company for $500 and for $220.26 costs and interest as set forth in the petition and that the same was recorded as set forth, but avers that said judgment was recovered in an action begun in this court for a personal injury inflicted upon the minor child of said Raskey and wife at a date shortly prior to April 1, 1893, to-wit, October 17, 1892, through the negligence in the running of a railway train of said Northern Pacific Railroad Company in King county, State of Washington.

XXIII.

Said Northern Pacific Railroad Company is and ever since the first day of August, 1893, has been insolvent, and by reason of its insolvency was placed in charge of the receivers of this court as hereinbefore alleged, and still continues under such receivership; that the said mortgages and the property therein conveyed are inadequate security for the payment of the indebtedness of the Farmers' Loan and Trust Company thereby sought to be secured; that the said judgments of said petitioners are not expenses incurred in the operation of the said Northern Pacific Railroad Company, and are not entitled to priority of the claim secured by the said mortgages, but are inferior thereto, and that all the funds, moneys and other property in the hands of the receiver of said Northern Pacific Railroad Company, after the payment of the costs of said receivership are subject to the lien of the said Mortgages hereinbefore set forth and if payment of said judgment and costs are made by the said receiver the same will and must be paid from funds in his possession in equity belonging to the said, The Farmers' Loan and Trust Company, in

trust as aforesaid for the payment of the bonds secured by said mortgages.

That neither of said claims representing said judgments are preferred claims; that neither thereof are or is a necessary or proper operating expense connected with the said Northern Pacific Railroad Company; and neither of said claims is or constitutes a prior lien upon the income of said railroad company in the hands of the receiver, and neither thereof is entitled to payment out of the funds in the custody or control of the receiver in preference to the mortgage claims and lien of the Farmers' Loan and Trust Company, as trustee aforesaid, under said mortgages, and the allowance of said judgment claims out of the income of said Northern Pacific Railroad Company, in the hands of said receiver is an impairment of the vested right and lien of the said Trust Company as trustee under said mortgage.

Wherefore, the said Farmers' Loan and Trust Company asks that the said order heretofore made in said matter allowing said claims be vacated and set aside and the prayer of said petition as to each of said claims be denied and the said petition be dismissed.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors for Farmers' Loan and Trust Company.

United States of America,
District of Washington,
County of King. } ss.

John B. Allen being first duly sworn, on oath deposes and says, that he is one of the solicitors for the intervening petitioner herein, The Farmers' Loan and Trust Com-

pany, in the above-entitled action; that he had read the foregoing intervening petition, knows the contents thereof and believes the same to be true; that he makes this affidavit for and in behalf of the said intervening petitioner, The Farmers' Loan and Trust Company, because the same is a corporation, and there is not officer of said corporation within the District.

JOHN B. ALLEN.

Subscribed and sworn to before me this 6th day of January, A. D. 1896.

[Notarial Seal] THEO. FORBY,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Answer of Farmers' Loan and Trust Co. to Petition of Petitioners. Filed Oct. 10, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

In Equity.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York,
Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and ANDREW F. BURLEIGH, as Receiver of The Northern Pacific R. R. Co.,
Defendants.
No. 337.

Petition for Appeal.

In the matter of the petition of Peter G. Longworth, Richard A. Bellinger and Michael Raskey.

The above-named complainant, conceiving itself aggrieved by the order duly made and entered on the 18th day of December, 1895, in the above-entitled cause, wherein and whereby an order of said court in said cause made and entered on the 16th day of August, 1894, directing the receivers of said Northern Pacific Railroad Company, within thirty days from that date to pay the amount of the judgments of said Peter G. Longworth, Michael Raskey and Annie Raskey, his wife, and R. A. Bellinger, against said Northern Pacific Railroad Company, or deposit with the Clerk of this court, receivers' certificates of the amount of said judgments. was modified so that the receiver of

The Northern Pacific Railroad Company was directed on or before the 31st day of December, 1895, to pay the amount of said judgments, together with costs in cash and wherein and whereby said Court refuses to vacate and set aside the said order of August 16th, 1894, does hereby appeal from the order and decree of said 18th day of December, 1895, to the United States Circuit Court of Appeals, of the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herein, and it prays that this appeal may be allowed, and that a transcript of the record and papers and proceedings upon which said order was made duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors for Complainant, The Farmers' Loan and Trust Company.

The foregoing claim of appeal is allowed.

C. H. HANFORD,
District Judge.

Dated January 20th, 1896.

[Endorsed]: Claim of Appeal. Filed Jan. 20, 1896, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By E. A. Colvin, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

In Equity.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York,
Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and ANDREW F. BURLEIGH, as Receiver of The Northern Pacific R. R. Co.,
Defendants.
No. 337.

Assignment of Errors.

In the matter of the Petition of Peter G. Longworth, Richard A. Bellinger and Michael Raskey.

Now, on this 20th day of January, 1896, comes the said complainant, The Farmers' Loan and Trust Company, by Struve, Allen, Hughes & McMicken, its solicitors, and says that the order and decree in said cause made and entered on the 18th day of December, 1895, is erroneous and against the just rights of the said complainant for the following reasons:

I. Because the order made August 16th, 1894, was made without the consent of the complainant, and without any notice to complainant or any appearance on its part.

II. Because it appears by the pleadings and record in said cause that the funds out of which the said receiver

was ordered to pay the amount of said judgments were subject to the prior and superior lien of the mortgage bonds and interest thereon mentioned and described in complainant's answer to the petition of said petitioners, Peter G. Longworth, Michael Raskey and Annie Raskey, his wife and R. A. Bellinger.

III. Because as the pleadings and record in said matter show, the several judgments, to-wit, the judgment of said Peter G. Longworth, for the sum of three thousand dollars, and costs, the judgment of said Michael Raskey and Annie Raskey for five hundred dollars and costs, and the judgment of R. A. Bellinger for fifteen hundred dollars and costs, nor either of them, or any part of them, is a preferred claim or an operating expense of said Northern Pacific Railroad Company, and because said claims nor any of them are entitled to be paid out of the income of the said Northern Pacific Railroad Company in the hands of the said receiver Andrew F. Burleigh, because it appears by the record in said cause that the lien of the mortgages given to the said complainant by The Northern Pacific Railroad Company is a primary lien upon all funds and moneys now or hereafter to be or come into the custody of said receiver.

IV. Because it appears by the pleadings and record in this cause that said Northern Pacific Railroad Company is insolvent and that all of its property and income are pledged to the payment of the bonds and interest secured by the mortgages to said complainant, The Farmers' Loan and Trust Company, mentioned and described in the pleadings in said matter.

V. Because it appears that the liabilities upon which each of said judgments was obtained were not contract obligations on the part of said Northern Pacific Railroad Company, nor did they or any of them constitute a legal or equitable claim or lien upon any of the property or moneys of said Northern Pacific Railroad Company in the custody of the said receiver.

VI. Because each of said judgments is founded upon a liability in tort on the part of The Northern Pacific Railroad Company, occurring long prior to the appointment of a receiver of its properties.

VII. Because the Court is not authorized to divert the income and money of the said Northern Pacific Railroad Company in the hands of its receiver from the payment of the mortgage obligations to the complainant for which they are pledged, to the payment of the liabilities arising from the negligence of The Northern Pacific Railroad Company in the operation of its road prior to the creation of said receivership.

Wherefore, the complainant prays that the said order and decree may be reversed, and that the said Court may be directed to enter a decree in accordance with the prayer of the answer of complainant, The Farmers' Loan and Trust Company, to the petition of said Peter G. Longworth, Michael Raskey and R. A. Bellinger, petitioners as aforesaid.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors for Complainant, The Farmers' Loan and Trust Company.

Copy of within assignment of errors received and due service of same acknowledged this 20th day of January, 1896.

JAMES HAMILTON LEWIS,
STRATTON, LEWIS & GILMAN,
Solicitors for Petitioners, Peter G. Longworth, Richard A. Bellinger, Michael Raskey and Annie Raskey, his Wife.

[Endorsed]: Assignment of Errors. Filed Jan. 20, 1896, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By E. A. Colvin, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

In Equity.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York, Complainant, vs. NORTHERN PACIFIC RAILROAD COMPANY, and ANDREW F. BURLEIGH, as Receiver of The Northern Pacific R. R. Co., Defendants.	No. 337.

Bond on Appeal to Peter G. Longworth.

In the matter of the Petition of Peter G. Longworth, Richard A. Bellinger and Michael Raskey.

Know All Men by These Presents, that we, The Farm-

ers' Loan and Trust Company as principal, and Jacob Furth and A. B. Stewart, as sureties, are held and firmly bound unto the said Peter G. Longworth in the full and just sum of six thousand ($6000) dollars, to be paid to the said petitioner, Peter G. Longworth, his certain attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our successors, and assigns, heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 20th day of January, 1896.

Whereas, lately, at a Circuit Court of the United States, for the District of Washington, Northern Division, in a suit pending in said court, between The Farmers' Loan and Trust Company, complainant, The Northern Pacific Railroad Company and Andrew F. Burleigh, receiver, defendants, and said Peter G. Longworth, Richard A. Bellinger and Michael Raskey, petitioners, an order or decree was rendered, directing the said Andrew F. Burleigh, as receiver, to pay to the said petitioner, Peter G. Longworth, certain amounts of money in his custody as receiver and the said complainant, The Farmers' Loan and Trust Company having obtained an appeal and filed a copy thereof in the Clerk's office of the said court to reverse the said order or decree in the aforesaid suit or proceeding, directing the payment to said petitioner, Peter G. Longworth, of said money, and a citation directed to the said petitioner, Peter G. Longworth, citing and admonishing him to be and appear at a certain session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in said circuit, on the ———— day of February next.

Now, therefore, the condition of the above obligation is such that if the complainant, The Farmers' Loan and Trust Company, shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and effect.

FARMERS' LOAN AND TRUST
COMPANY, [Seal]
By Maurice McMicken,
Its Att'y in Fact.

JACOB FURTH, [Seal]

A. B. STEWART. [Seal]

Signed, sealed and delivered in presence of:
M. L. Sylvester,
H. J. Ramsey.

Taken and subscribed before me this 20th day of January, 1896.

[Seal] JAMES KIEFER,
Commissioner of the Circuit Court of the United States for the District of Washington.

Approved by

C. H. HANFORD,
Judge.

United States of America,
District of Washington,
County of King. } ss.

Jacob Furth and A. B. Stewart, of the county of King, in the State of Washington, the sureties named in the foregoing bond, being each for himself duly sworn, deposes and says, that he is a resident and a freeholder in the District of Washington, and is worth at least the sum of

six thousand ($6000) dollars, over and above all just debts and liabilities, exclusive of property exempt from execution, that he is not an officer of this or any other court in said district.

JACOB FURTH,
A. B. STEWART.

Subscribed and sworn to before me this 20th day of January, 1896.

JAMES KIEFER,
Commissioner of the Circuit Court of the United States, for the District of Washington.

[Endorsed]: Bond on Appeal. Filed Jan. 20, 1896, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By E. A. Colvin, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

In Equity.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York, Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and ANDREW F. BURLEIGH, as Receiver of The Northern Pacific R. R. Co., Defendants. } No. 337.

Bond on Appeal to Michael Raskey and Wife.

In the matter of the Petition of Peter G. Longworth, Richard A. Bellinger and Michael Raskey.

Know All Men by These Presents, that we, The Farm-

ers' Loan and Trust Company as principal, and Jacob Furth and A. B. Stewart, as sureties, are held and firmly bound unto the said Michael Raskey and Annie Raskey, his wife, in the full and just sum of one thousand ($1000) dollars, to be paid to the said petitioners, Michael Raskey and Annie Raskey, his wife, their certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our successors, and assigns, heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 20th day of January, 1896.

Whereas, lately, at a Circuit Court of the United States, for the District of Washington, Northern Division, in a suit pending in said court, between The Farmers' Loan and Trust Company, complainant, The Northern Pacific Railroad Company and Andrew F. Burleigh, receiver, defendants, and said Peter G. Longworth, Richard A. Bellinger and Michael Raskey, petitioners, an order or decree was rendered, directing the said Andrew F. Burleigh, as receiver, to pay to the said petitioners, Michael Raskey and Annie Raskey, his wife, certain amounts of money in custody as receiver and the said complainant, The Farmers' Loan and Trust Company having obtained an appeal and filed a copy thereof in the Clerk's office of the said court to reverse the said order or decree in the aforesaid suit or proceeding, directing the payment to said petitioners, Michael Raskey and Annie Raskey, his wife, of said money, and a citation directed to the said petitioners, Michael Raskey and Annie Raskey, his wife, citing and admonishing them to be and appear at a certain session of the United

States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in said circuit, on the ——— day of February next.

Now, therefore, the condition of the above obligation is such that if the complainant, The Farmers' Loan and Trust Company, shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and effect.

FARMERS' LOAN AND TRUST
COMPANY, [Seal]
By Maurice McMicken,
Its Att'y in Fact.

JACOB FURTH, [Seal]
A. B. STEWART. [Seal]

Signed, sealed and delivered in presence of:
M. L. Sylvester,
H. J. Ramsey.

Taken and subscribed before me this 20th day of January, 1896.

[Seal] JAMES KIEFER,
Commissioner of the Circuit Court of the United States for the District of Washington.

Approved by
C. H. HANFORD,
Judge.

United States of America,
District of Washington,
County of King. } ss.

Jacob Furth and A. B. Stewart, of the county of King, in the State of Washington, the sureties named in the fore-

going bond, being each for himself duly sworn, deposes and says, that he is a resident and a freeholder in the District of Washington, and is worth at least the sum of one thousand ($1000) dollars over and above all just debts and liabilities, exclusive of property exempt from execution; that he is not an officer of this or any other court in said district.

JACOB FURTH,
A. B. STEWART.

Subscribed and sworn to before me this 20th day of January, 1896.

[Seal] JAMES KIEFER,
Commissioner of the Circuit Court of the United States, for the District of Washington.

[Endorsed]: Bond on Appeal. Filed Jan. 20, 1896, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By E. A. Colvin, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

In Equity.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York,
Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and ANDREW F. BURLEIGH, as Receiver of The Northern Pacific R. R. Co.,
Defendants.
No. 337.

Bond on Appeal to Richard A. Bellinger.

In the matter of the Petition of Peter G. Longworth, Richard A. Bellinger and Michael Raskey.

Know All Men by These Presents, that we, The Farmers' Loan and Trust Company as principal, and Jacob Furth and A. B. Stewart, as sureties, are held and firmly bound unto the said Richard A. Bellinger in the full and just sum of three thousand ($3000) dollars, to be paid to the said petitioner, Richard A. Bellinger, his certain attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our successors, and assigns, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of January, 1896.

Whereas, lately, at a Circuit Court of the United States, for the District of Washington, Northern Division, in a

suit pending in said court, between The Farmers' Loan and Trust Company, complainant, The Northern Pacific Railroad Company and Andrew F. Burleigh, receiver, defendants and said Peter G. Longworth, Richard Bellinger and Michael Raskey, petitioners, an order or decree was rendered, directing the said Andrew F. Burleigh, as receiver to pay to the said petitioner, Richard A. Bellinger, certain amounts of money in his custody as receiver and the said complainant, The Farmers' Loan and Trust Company having obtained an appeal and filed a copy thereof in the Clerk's office of the said court to reverse the said order or decree in the aforesaid suit or proceeding, directing the payment to said petitioner, Richard A. Bellinger, of said money, and a citation directed to the said petitioner, Richard A. Bellinger, citing and admonishing him to be and appear at a certain session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in said circuit, on the ———— day of February next.

Now, therefore, the condition of the above obligation is such that if the complainant, The Farmers' Loan and Trust Company, shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and effect.

FARMERS' LOAN AND TRUST
COMPANY, [Seal]
By Maurice McMicken,
Its Att'y in Fact.
JACOB FURTH, [Seal]
A. B. STEWART. [Seal]

Signed, sealed and delivered in presence of:

M. L. Sylvester,

H. J. Ramsey.

Taken and subscribed before me this 20th day of January, 1896.

[Seal] JAMES KIEFER,

Commissioner of the Circuit Court of the United States, for the District of Washington.

Approved by

C. H. HANFORD,

Judge.

United States of America,
District of Washington, } ss.
County of King.

Jacob Furth and A. B. Stewart, of the county of King, in the State of Washington, the sureties named in the foregoing bond, being each for himself duly sworn, deposes and says, that he is a resident and a freeholder in the District of Washington, and is worth at least the sum of three thousand ($3000) dollars over and above all just debts and liabilities, exclusive of property exempt from execution; that he is not an officer of this or any other court in said district.

JACOB FURTH,

A. B. STEWART.

Subscribed and sworn to before me this 20th day of January, 1896.

[Seal] JAMES KIEFER,

Commissioner of the Circuit Court of the United States, for the District of Washington.

[Endorsed]: Bond on Appeal. Filed Jan. 20, 1896, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By E. A. Colvin, Deputy.

United States Circuit Court of Appeals for the Ninth Circuit.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York,
Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and ANDREW F. BURLEIGH, as Receiver of The Northern Pacific R. R. Co.,
Defendants.
} No. 337.

Citation.

United States of America, Ninth Judicial Circuit. } ss.

In the matter of the Petition of Peter G. Longworth, Richard A. Bellinger, and Michael Raskey.

To Peter G. Longworth, Michael Raskey and Annie Raskey, his wife, and R. A. Bellinger:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in said circuit, on the within thirty days after the date of this citation next, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern

Division, wherein The Farmers' Loan and Trust Company is complainant and appellant and you are petitioners and appellees, to show cause, if any there be, why the order or decree made and entered in said cause on the 18th of December, 1895, to the prejudice of appellant, directing the payment of the amount of certain judgments in your favor, respectively, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 20th day of January, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of America the one hundred and twentieth.

[Seal] C. H. HANFORD,
U. S. District Judge.

Copy of within citation on appeal received and due service of same acknowledged this 21st day of January, 1896.

JAMES HAMILTON LEWIS,
STRATTON, LEWIS & GILMAN,
Solicitors for Petitioners, Peter G. Longworth, Richard A. Bellinger, Michael Raskey and Annie Raskey, his Wife.

In the Circuit Court of the United States, for the District of Washington, Northern Division, Ninth Judicial Circuit.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York, Complainant, vs. NORTHERN PACIFIC RAILROAD COMPANY and ANDREW F. BURLEIGH, as Receiver of The Northern Pacific R. R. Co., Defendants.	No. 337.

Clerk's Certificate.

In the matter of the Petition of Peter G. Longworth, Richard A. Bellinger and Michael Raskey.

United States of America, }
District of Washington. } ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the District of Washington, hereby certify the foregoing forty-four (44) typewritten pages, numbered from one (1) to forty-four (44) inclusive, to be a full, true and correct transcript of the record on appeal to the United States Circuit Court of Appeals, wherein The Farmers' Loan and Trust Company, complainant, is appellant, and Peter G. Longworth, Richard A. Bellinger and Michael Raskey, petitioners, are appellees, and

I further certify that the cost of preparing and certify-

ing the said transcript on appeal amounts to the sum of twenty-three and 30-100 dollars ($23.30,) and that the same has been paid to me by Messrs. Struve, Allen, Hughes & McMicken, attorneys and solicitors for said complainant and appellant.

Witness my hand and seal of said Circuit Court at Seattle, this 14th day of March, A. D., 1896.

[Seal] A. REEVES AYRES, Clerk,
By R. M. Hopkins, Deputy Clerk.

[Endorsed]: No. 288. In the United States Circuit Court of Appeals, for the Ninth Circuit. The Farmers' Loan and Trust Company, Appellants, vs. Peter G. Longworth, et al. Transcript of Record. Appeal from the United States Circuit Court, District of Washington, Northern Division.

Filed March 19, 1896.

F. D. MONCKTON,
Clerk.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York,
Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, ET AL., and ANDREW F. BURLEIGH, as Receiver of the Northern Pacific Railroad Company,
Defendants.

JOHN B. ALLEN, Solicitor for Complainant.
J. M. ASHTON, Solicitor for Receiver.
STRATTON, LEWIS & GILMAN, Solicitors for Petitioners.

Opinion.

In the matter of the several claims of the intervening petitioners, R. A. Bellinger, Peter G. Longworth and Michael Raskey, founded upon judgments of this Court in their favor, against the Northern Pacific Railroad Company, an order was made by this Court more than one year ago, directing the receivers to pay the sums due to each, respectively, out of the funds in their hands, or in case of their inability for want of sufficient funds to make the payments within thirty days, to issue receivers' certificates. That order was afterwards suspended, pending a hearing upon an application made by the Farmers' Loan and Trust Company to have the same vacated.

The Trust Company has filed an answer denying the preferential character of each of the claims, and the questions at issue were argued and submitted, and have been held under advisement for a considerable time.

I have held this matter under advisement until now, for the reason that it has been exceedingly difficult for me to determine the questions at issue in a manner satisfactory to myself. Having read all the adjudged cases which

have been brought to my attention which seem to bear upon the questions, I must acknowledge that the weight of authority is opposed to the allowance out of the trust funds in the hands of the receivers of a railroad, of claims founded upon judgments against the railroad corporation, for torts, yet every time I have attempted to make a decision in line with the majority of adjudged cases, my own mind has revolted. I have not found any decision of the Supreme Court exactly in point, but the general principles laid down in Fosdick vs. Schall, 99 U. S. 235, 236; Miltenberger vs. Logansport Railway Co., 106 U. S. 286-314; and Union Trust Co. vs. Illinois Midland Railway Co., 117 U. S. 434-481, are properly applicable. Those cases have not been overruled by any subsequent decision of the Supreme Court, and they established the general proposition that the debts of a railroad corporation, for necessary operating expenses, created while its property is mortgaged, are entitled to rank as preferred debts, having priority over the mortgage, when in a court of equity it becomes necessary to marshal the assets of the corporation, and to apply the income or proceeds of the property to satisfy the claims of creditors.

I have stated my views in general, in the decision recently made in this case, in ordering payment of the O'Brien judgment, and it is not necessary for me to go over the ground again at this time, I merely wish to announce that in allowing the claims of the petitioners herein, I base my decision entirely upon the proposition that these judgments are founded upon liabilities necessarily incurred in operation of the railroad by the corporation, and the same having been rendered by this Court after the appointment of the receivers, they are entitled to be paid as other current operating expenses; and I expressly hold in opposition to the argument of counsel for the petitioners, that the mortgages represented by the Farmers' Loan and Trust Company are invalid in this State as to the personal property of the corporation, because of non-

compliance with the statute of Washington Territory relating to chattel mortgages, prescribing certain formalities in the execution and recording of such mortgages, and declaring that without such formality, chattel mortgages are void as to creditors, subsequent incumbrancers and purchasers. These mortgages were authorized by an act of congress and were executed and recorded in compliance with that act, therefore, no legislation by the Territory of Washington could impair the validity thereof.

At this time, the receiver has funds on hand sufficient to pay these claims, and it is not necessary for the Court to allow further time, nor to issue receivers' certificates. I direct that the former order, requiring the receivers to pay these claims, be now modified so as to direct the receiver to pay the principal of each claim, in cash, and costs, on or before the 31st day of December, 1895. Interest will not be allowed.

C. H. HANFORD,
Judge.

In the Circuit Court of the United States, for the District of Washington, Northern Division, Ninth Judicial Circuit.

THE FARMERS' LOAN AND TRUST COMPANY, a Corporation of the State of New York, Complainant, vs. NORTHERN PACIFIC RAILROAD COMPANY, ET AL., and ANDREW F. BURLEIGH, as Receiver of the Northern Pacific Railroad Company, Defendants. R. A. BELLINGER, PETER G. LONGWORTH and MICHAEL RASKEY, Petitioners.	No. 337.

Certificate.

United States of America, }
District of Washington. } ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the District of Washington, do hereby certify the foregoing three (3) typewritten pages numbered from one to three (3) inclusive, to be a full, true and correct copy of the opinion of the Court in re petition of R. A. Bellinger, Peter G. Longworth and Michael Raskey, filed in the above-entitled cause on the 18th day of December, 1895. And I further certify that the said opinion was through inadvertence omitted from the transcript heretofore forwarded to the United States Circuit Court of Appeals, in the case of The Farmers' Loan and Trust Company, a corporation of the State of New York, Complainant, vs. Northern Pacific Railroad Company, et al., and Andrew F. Burleigh, as Receiver of the Northern Pacific Railroad Company, Defendants, R. A. Bellinger, Peter G. Longworth and Michael Raskey, Petitioners.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 28th day of April A. D. 1896.

[Seal] A. REEVES AYERS,
Clerk of the Circuit Court for the District of Washington.
By R. M. Hopkins, Deputy Clerk.

[Endorsed]: No. 288. In the Circuit Court of the United States for the District of Washington. Farmers' Loan and Trust Co. vs. N. P. R. R. Co. et al. Certified Copy. Opinion.

Filed May 1, 1896.

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit.

No. 288.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN AND TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

HON C. H. HANFORD, Judge.

BRIEF OF APPELLANT.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors for Appellant.

HERBERT B. TURNER, *Of Counsel.*

SEATTLE

No. 288.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN AND TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

HON C. H. HANFORD, Judge.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

A general mortgage foreclosure suit,—The Farmers' Loan and Trust Company against the Northern Pacific Railroad Company and others,—was, during the month of October, 1893, instituted in the several Circuit Courts of the United States for the Districts within which prop-

erty of the mortgagor company is situated, and receivers were appointed to take possession of and operate the properties during the pendency of said suit.

On October 30th, 1893, an order was made in the Circuit Court for the District of Washington, Northern Division, whereby all of the properties of the Railroad Company and income derivable therefrom were sequestered under this foreclosure suit, the receivers immediately taking possession, and having since operated the road under the order of their appointment.

In the month of August, 1894, petitioners intervened in the foreclosure suit by filing their joint petitions, in which they set up their respective judgments against the Northern Pacific Railroad Company, being in the same court, giving the amounts and dates of their judgments, and referring to the records of the court for the history of their respective suits. It was claimed that all the suits were pending prior to the appointment of the receivers, and that the latter had ignored their demands for payment. (Transcript, pp. 2 and 3.)

The prayer of the petition was granted by the court making an order, on August 16th, 1894, that within thirty days after the date of its order, the receiver make payment of said judgments in cash or deposit with the clerk of the court receiver's certificates for the amount of said claims. (Transcript, p. 5.)

No notice of this proceeding was given The Farmers' Loan and Trust Company, and it was without any knowledge of the same until after the order had been entered. (Transcript, pp. 6 and 8.)

Upon the application of The Farmers' Loan and Trust

Company, the court suspended the execution of the order directing payment of the judgments, and gave The Farmers' Loan and Trust Company leave to show cause why this order of preference should be set aside.

Upon motion of the petitioners, this application to show cause was brought on for hearing. Hearing was had upon the record of the cause, and after having been taken under advisement, an order was entered December 18th, 1895, denying the motion to vacate the original order directing the payment of the judgments, and modifying that order so that the receiver was directed on or before the 31st day of December, 1895, to pay the respective judgments with costs, but without interest, in cash. (Transcript, pp. 12 and 13.)

In order to save a voluminous record, and at the same time present for review in this court the same matter that was passed upon by the lower court, Judge Hanford permitted the filing of a *nunc pro tunc* answer of October 10th, 1894, upon the part of The Farmers' Loan and Trust Company. (Transcript, pp. 14 and 15.) This answer is found at p. 16 of the transcript. It summarizes the Bill of Complaint in the foreclosure suit of The Farmers' Loan and Trust Company against the Northern Pacific Railroad Company *et al.*, by setting forth the incorporation of the Railroad Company, and the scope of its grants and franchises under the Act of Congress of July 2nd, 1864, and the subsequent acts of Congress, as well as the legislation of the several states, and that by virtue thereof the Railroad Company had become seized and possessed of large quantities of land and an extensive mileage of railroads, with their equipments, appurtenances, rolling stock and other properties, all of

which were embraced in and subject to the liens of the mortgages set forth in the answer. This answer fully set forth the several mortgages for the foreclosure of which the action was brought, and described the property embraced within these mortgages as constituting all and singular the main and branch railroads and telegraph lines of the Northern Pacific Railroad Company, all its lands, tenements and hereditaments acquired or appropriated, or thereafter to be acquired or appropriated, for any purpose connected with its main or branch lines of road; and, in short, everything pertaining to or incident to these lines of railroad or telegraph or designed to be used or enjoyed in connection with them, and all the rolling stock, equipments, privileges, immunities and franchises connected with or in any wise relating to the lines of railroad or telegraph then or thereafter to be acquired; all corporate franchises, and generally all other property or rights of property of every kind and nature then or thereafter to be acquired and wheresoever situated, together with all the income, earnings and profits of all of such properties; and that the same were an inadequate security for the payment of the indebtedness for which they were given. And it was alleged that each of the mortgages was the proper act of the corporation, that each was made in conformity to law, and that each was duly recorded in the office of the Secretary of the Interior.

The answer further set forth the default of the Railroad Company in making payment of interest upon its bonded indebtedness secured by the mortgages, its insolvency, the commencement of the action for the foreclosure, the appointment of the receivers in the fore-

closure suit, the sequestration of the property and income, the possession of all such properties with the income by the receivers, and their operation of the road. The answer also admits the judgments of the petitioners in the amounts alleged and as set forth in the journal of the court. It gives the history of each of these judgments as shown by the record as follows:

In the case of Peter G. Longworth, action was commenced against the Northern Pacific Railroad Company June 19th, 1891, for personal injuries resulting to him as a passenger through negligence on the part of the agents of the Railroad Company. Verdict was rendered October 16th, 1893, and judgment rendered thereon October 30th, 1893, for three thousand dollars and costs.

The case of Richard A. Bellinger was an action for breach of a contract made by him with the Northern Pacific Railroad Company in settlement of a claim for personal injuries received by him through the carelessness of the Railroad Company, while in its employ, January 16, 1888. The judgment was recovered October 24, 1893, for the sum of fifteen hundred dollars and costs.

While the case of Michael Raskey and wife was for personal injuries inflicted on their minor child by being carelessly run over by the Railroad Company's train on October 17, 1892. The action was commenced April 1, 1893, and judgment rendered thereafter for five hundred dollars and costs. (Transcript, p. 27, paragraphs 20, 21 and 22.)

ERROR.

The error relied upon is, the order of the Court making the foregoing claims a preferential lien upon the trust fund in the custody of the receiver.

ARGUMENT.

It will be observed from the foregoing statement, that the Northern Pacific Railroad Company, and all its properties, went into the hands of the receivers, under the mortgage foreclosure suit, on October 30, 1893, and that all the income of its properties thereafter became a trust fund in the custody of the court to be applied to the payment of the mortgage indebtedness; that all three of the claims set forth in the petition are based upon personal injuries occurring through the negligent operation of the railroad, the first being an injury to a passenger occurring some time prior to June 19, 1891, more than two years before the appointment of the receiver; the second, that of an employee of the Railroad Company, injured through its carelessness nearly six years before the appointment of the receiver, and whose cause of action is based upon a contract made in settlement for this personal injury claim; and the third being that of a personal injury caused to a child by the negligent running of a train more than a year prior to the appointment of the receiver. The record shows that all of the property of the Northern Pacific Railroad Company is covered by the mortgages of that company to The Farmers' Loan and Trust Company to secure the payment of its bonded indebtedness, and that

these mortgages were existing liens upon the property of the Railroad Company at the time the several injuries occurred, and that the income of the road had been sequestered before any levy or other lien had attached to it.

The question is, therefore, clearly presented whether claims arising from personal injuries caused by the careless operation of a railroad, at any time within the statute of limitations, prior to the road going into the hands of a receiver, take precedence over the mortgage lien upon the trust fund. A reference to the order and opinion of the court will show that the presiding judge met this question directly, and held the personal injury claim to be a lien superior to that of the mortgage upon the trust property in the custody of the court.

The order allowing the filing of the answer of The Farmers' Loan and Trust Company to the petition (Transcript, p. 14), recites: "* * * To the end that the issues argued by counsel, and upon which said matter was heard and determined by the court, may fully appear in the pleadings and record of this matter, viz, as to whether the respective claims of said petitioners are operating expenses of said Northern Pacific Railroad Company of such a character as to have precedence over and be a superior lien upon the income of the said Northern Pacific Railroad Company, in the hands of its receivers, over the lien of the mortgages of said Northern Pacific Railroad Company to The Farmers' Loan and Trust Company, as trustee." * * *

Thus it is seen that the trial court met the proposition squarely as to whether a judgment against a railroad company for personal injuries arising through

the carelessness of its operatives prior to the appointment of a receiver is a liability entitled to preference over the lien of a prior recorded mortgage upon the income and property of the corporation, and sought to afford and facilitate a review of his judgment upon that question in this court.

That such a claim is in no sense preferential, and that it can be regarded in no more favorable light than that of a general credit, may safely be submitted on the adjudicated cases in the federal courts.

In Davenport v. Receivers Alabama & Chat. R. R. Co., 2 Wood's (U. S.) Reports, p. 519, a passenger who had sustained damages while traveling upon a road in the hands of a receiver, obtained judgment for personal injuries resulting from the carelessness of those operating the road, and petitioned to have the amount of the judgment allowed out of the trust fund. Woods, Circuit Judge, in denying the claim, said:

"The exercise of power by a court to displace liens can only be sustained on the ground of actual necessity, and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing contracts." Page 523.

In *In re* Dexterville Manufacturing & Boom Co., 4 Fed., 873, claims were presented, to be allowed as preferential, for damages to timber and cranberry marshes occasioned by fire negligently permitted to escape from the engines of a railroad company before it went into the hands of a receiver. Dyer, D. J., in denying them, said:

"The road was still being operated by the company, nd whatever liability existed must have been one

against the company alone. In no just or proper sense could such claims as these be considered as part of the operating expenses upon which the petitioners could assert a right prior to that of the mortgagees. They are wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which the courts sometimes order paid from net earnings, in the hands of a receiver, as having equities superior to those of bondholders. If such claims as are here in question could be allowed, there would seem hardly to be a limit to the allowance of demands which it might be as forcibly urged were superior in their equities to those of the secured creditors, but which could not be allowed upon any sound principle of equity, nor without substantially impairing, and perhaps destroying, an otherwise valuable security."

In Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 28 Fed., 871, a shipper intervened in a foreclosure suit, and prayed that payment of damages, resulting to him from the failure of the railroad, shortly before going into the control of the receiver, to transport certain cars of grain, be allowed out of the rents and profits in the hands of the receiver. Treat, J., in passing upon this claim, said:

"The effect of this is that the amount for which the Wabash Company should have responded in 1881 is allowable against the Wabash Corporation, as a corporation, and not against the receivers, or the funds in their hands earned since their appointment, to be made prior in right to the mortgages."

In Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. Ry. Co., 45 Fed., 664, the administratrix of a deceased conductor, by petition, showed that in April,

prior to the appointment of the receiver in August, the conductor, while in the discharge of his duty, had lost his life by virtue of the carelessness of the railroad company, and sought to have the amount of the claim for the injury made a charge upon the income and *corpus* of the property superior to the lien of the mortgage. Jenkins, J., in denying the claim, said:

"The loss of life occurred in the operation of the road, but arose from a failure of duty. It happened in the performance of the contract, but not because of performance. Its promoting cause was the default of the company, not the labor performed. The resulting death was a detriment, not an aid, to the road. It was in no possible sense of advantage to the mortgage interest."

In Central Trust Co. v. East Tennessee &c R. R. Co., 30 Fed., 895, Pardee, J., in passing upon such a claim, says:

"The petitioner's claim against the railroad company is for personal injuries growing out of the negligence of the company's agents more than four years prior to the suit for foreclosure. Neither on principle nor authority can we adjudge such a claim to be prior in right to the mortgage bondholders."

In Farmers' Loan & Trust Co. v. Detroit &c R. R. Co., 71 Fed., 29, a receiver was appointed in October, 1893. In 1891, while the railroad company was still operating the road, a passenger on a train was injured by reason of the carelessness of the operatives. A judgment for ten thousand dollars was recovered which it was attempted to have declared a lien upon the trust fund in the hands of the receiver superior to that of the mortgage. Swan, District Judge, in denying the claim, said:

"Petitioner's judgment for personal injuries does not entitle him to rank as a secured creditor of the railroad company, nor has a court of equity power to displace the vested right of the bondholder in favor of such a claim."

Perhaps the most exhaustive case upon this subject is that of St. Louis Trust Co. v. Riley, 70 Fed., 32. Judgment for several thousand dollars was recovered in an action for personal injuries occurring five months before the street railway went into the hands of a receiver. After a review of many cases, Sanborn, Circuit Judge, expressed the views of the Circuit Court of Appeals as follows:

"But a claim for damages for the negligence of the mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgage security. Wages, traffic balances, and supplies produce or increase income, and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of the mortgagor neither produces an income nor enhances the value of the property. The wages, traffic balances, and claims for material and supplies accrue under and pursuant to the contract between the mortgagor and the mortgagee that the former will properly operate the railroad. The damages for negligence accrue in violation of that contract, and for a breach of the duty of the mortgagor to operate the railroad carefully. Many preferential claims are for property or services that were necessary to make or keep the railroad a going concern, necessary to its operation. The negligence that is the foundation of this claim did not tend to keep the railroad in operation, but, if repeated and continued, would inevitably stop it. It was not necessary, but was deleterious, to its opera-

tion. For these reasons this claim for damages cannot, in our opinion, be allowed a preference over the mortgage debt in payment out of the income earned by the receivers appointed under the bills for the foreclosure of these mortgages."

Most of these rejected claims were presented upon rules claimed to have been laid down in decisions of the Supreme Court, particularly in the cases of Fosdick v. Schall, 99 U. S., 235, Miltenberger v. Logansport Ry. Co., 106 U. S., 286, and Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S., 434, which were cited by the Judge of the lower court as laying down the rules governing his decision in the case at bar. We respectfully submit that nothing in the facts of either of these cases, nor in the principles laid down in them, nor in their subsequent application by the Supreme Court of the United States, will warrant the construction claimed. Detached statements taken from these opinions have been invoked to establish rules which the cases in themselves would not warrant, and which the learned justices in subsequent opinions have taken pains to show were not intended and were not sanctioned by the court. Perhaps no case has been resorted to so often as that of Fosdick v. Schall, *supra*, for the purpose of displacing the vested rights of railroad mortgagees and impairing the obligation of contracts. A critical examination of that case cannot warrant the conclusion so frequently sought to be drawn from it—that the mortgagee of a railroad company stands upon ground but little, if any, better than that of a general creditor.

Two questions were determined in that case. First, that by a conditional sale of rolling stock made to a

railroad company and its receiver in the form of a lease, in which payments were to be made of an amount equaling the agreed purchase price, title to the cars did not pass from the seller until the price was paid. Second, that an order of the court directing a receiver out of the trust funds to pay the seller rental for his cars for the time they were used in operating the road prior to the receivership was invalid against the bondholders and that the vendor was simply a general creditor with no equitable claim on the fund. The facts as found were that Schall, the manufacturer of cars, had in the form of a lease conditionally sold a large number of cars to be used in operating a railroad, and of which, when certain installments equaling the price of the cars should be paid, the railroad company should become the owner. For nearly two years the cars were used on the road, and partial payments were made under the contract, when a receiver, at the instance of a creditor, was appointed in a state court, who continued using these cars in the operation of the road. After the cause had been removed to the federal court, the use of the cars still continued, and up to and until after the appointment in the federal court of a receiver in the action of Fosdick, Trustee, to foreclose the mortgage. The receiver in the foreclosure suit, finding the cars were essential to the operation of the road, arranged a valuation with Schall and agreed in the form of rent to make monthly payments until the agreed price should be paid. The road was sold under foreclosure, and Schall petitioned to have his cars returned and rental for their use as a necessary part of the operation of the road during the six months prior and following the receivership in the state

court decreed a preferential claim. It was held by the Circuit Court he was entitled to a return of his cars and an equitable claim upon the fund superior to that of the mortgage for their use during the time stated. The Supreme Court sustained his claim of ownership of the cars but overruled the lower court in holding he had a superior claim for the payment of the rental on the fund for which the railroad was sold.

If we correctly comprehend the general principles laid down in that case, aside from the two specific questions determined, they are, first, that the general and extensive character of the business of a railroad requires credit should be given to meet its current expenses, and that the mortgagee is confined to the net income after current operating expenses are paid, and if moneys that should be so paid have been diverted either to the payment of the mortgage or in building up the mortgage security, equity will compel a restoration; and the second general rule is that the appointment of a receiver in aid of a mortgage foreclosure is not a matter of right but of favor within the discretion of the Chancellor, and in granting such favor conditions may be imposed and concessions required of the mortgagee which if acquiesced in by accepting the receivership become binding upon the mortgagee. Applying the rules thus laid down to the facts in the case, the Supreme Court held that for the use of the rolling stock essential to the operation of the road for the period of time before and subsequent to the appointment of the receiver in the state court no preferential lien existed, and in denying the claim says:

"In short, as the case stands, no equitable claim whatever has been established upon the fund in court. *Prima facie* that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only." P. 255.

In the case of Miltenberger v. Logansport Railway Company, 106 U. S., 286, the railroad company gave as first mortgage security a million and a half dollars of bonds, and then a second mortgage securing five hundred thousand. In 1874, in the foreclosure of the second mortgage, a receiver was appointed, and in the order of appointment he was directed to manage and operate the road, make repairs, and pay operating arrears for the preceding ninety days. The road was without adequate rolling stock. Subsequently, orders were made to purchase stock and pay prior freight and traffic balances. The trustee of the first mortgage appeared in the suit, and upon a conference with and consent of about two-thirds of the holders of the first mortgage bonds, the receiver obtained the consent of the court to borrow about three hundred thousand dollars to pay indebtedness incurred to meet the needs of the road. In 1876, the first mortgage holders by cross-bill proceeded to a foreclosure. A decree was entered foreclosing both mortgages on identically the same property, the question of priority of claims being left for future determination. The road was operated by the receiver until 1879, and when the sale was made, a contest was had over the application of the funds. Objection was made to the preference given the claim for rolling stock and prior operating expenses, freight balances and the construction of a

short piece of road. The payment of all these claims was shown to have been indispensable to the operation of the road. It was shown that all the payments had been strictly within the orders of the court. The lease expenditures were disposed of as incurred by the consent of all parties. The court found that the claims for repairs, freight balances and supplies were made with discrimination and within the scope of its orders.

The opinion brings out the facts that the first mortgage bondholders, by their trustee, were all the while in court, and that about two-thirds of them had consented to and advised the borrowing of the money for the purposes named. It meets the objection coming from the holders of the first mortgage bonds by saying:

"It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensible to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts, of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care."

In the case of the Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S., 434, the order appointing the receiver was broad and comprehensive, and also explicit in the character of liabilities the receiver was authorized to incur, and the character of demands he was authorized to pay as preferential to the lien of the mortgage. An objection was made to the receiver giving such preferences. The court held, in most instances, after examining each, that the claims came within the

rule laid down in the order of appointment. It followed the rule laid down in Wallace v. Loomis, 97 U. S., 146, that the court, in order to preserve a railroad coming under its custody, had the power to authorize necessary repairs, the purchase of necessary rolling stock, and to complete an unfinished portion of the line, making the cost a superior claim; and also followed the rule laid down in Miltenberger v. Logansport Ry. Co., *supra*, that such power extends to providing for operating expenses and freight balances. There is no extension of the doctrine beyond the two earlier cases. It will be observed that no allusion in any of the three cases is made to a claim arising in tort or springing out of negligence on account of which the railroad companies became liable. In each of these cases the claims were subjected to a critical and severe test, and unless they came under the rule, no difference how meritorious on the part of the claimant or beneficial to the corporation, they were disallowed.

The rule in Fosdick v. Schall, *supra*, is made even more conspicuous in the case of Huidekoper v. Locomotive Works, decided at the same time (99 U. S., 258), in which the Supreme Court reverses the ruling of the lower court allowing the owner of rolling stock, under similar circumstances, a preferential claim for what the Circuit Court ascertained to be an equitable allowance for the use of and repairs to its locomotives while operated by the railroad company.

Commenting upon these cases, in Burnham v. Bowen, 111 U. S., 776, the court says:

"We do not now hold, any more than we did in Fosdick v. Schall, or Huidekoper v. Locomotive Works, 99

U. S., 258, 260, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."—P. 783.

In the case of Kneeland v. American Loan Co., 136 U. S., 89, a railroad, with its rolling stock, was placed in the hands of a receiver at the instance of a creditor. He, among others, rented rolling stock leased to the company with a right of purchase, and there being a deficit in the running of the road by the receiver the rental for such rolling stock was not paid. The lessor took possession of his stock and made a claim for rent, to have priority over the creditors on the foreclosure of the mortgage and the sale of the road under such foreclosure. The Supreme Court denied this claim, and in the course of the decision says:

"Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this Court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some

courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage upon a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this Court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

See, also, Morgan's Company v. Texas Central Ry. Co., 137 U. S., 171, 198, 199, and Thomas v. Western Car Co., 149 U. S., 95, 111.

In the last case, after citing the above quoted language from Kneeland v. American Loan Company, with approval, the court says:

"The case of a corporation for the manufacture and sale of cars, dealing with a railroad company, whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and em-

ployes, or of those who furnish, from day to day, supplies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."—Page 112.

A review of the foregoing cases must deeply impress one that aside from the limited class of cases enumerated as exceptions, the Supreme Court of the United States has sought to correct the impression that mortgages on railroads are of a less binding and obligatory character than mortgages executed by owners of other kinds of property, and have endeavored to leave the impression that the security of railroad mortgagees, aside from these limited exceptions, stands upon precisely the same basis as that of other mortgagees.

The person who furnishes means for the construction of a railroad no doubt has in one sense an equitable property in that construction, but his claim not coming within the limited category prescribed cannot displace the lien of an existing mortgage.

In Toledo &c. R. R. Co. v. Hamilton, 134 U. S., 296, where one Hamilton had erected a dock in the City of Toledo on the property of the Railroad Company, and as a part of its system, he applied to have his claim preferred over that of the mortgagee upon the trust fund in the hands of the receiver in a mortgage foreclosure suit. No question was made as to the amount due from the Railroad Company for the work he did nor as to the construction of the dock being an improvement of the railroad property. It was held in the lower court that his construction had gone into the improvement and

building up of the mortgage security and gave an equitable priority of payment analagous to that of a mechanic's lien. The Supreme Court in denying this claim, says:

"The record imparted notice to Hamilton, and to all others, of the facts and terms of the mortgage; and the question is thus presented, whether a railroad company, mortgagor, can three years after creating by recorded mortgage an express lien upon its property, by contract with a third party displace the priority of the mortgage lien. It would seem that the question admits of but a single answer. Certainly as to ordinary real estate, no one would have the hardihood to contend that it could be done; and there is in this respect no difference between ordinary real estate and railroad property."

TORT LIABILITIES ARE NOT OPERATING EXPENSES.

Why should one who has no contract claim whatever, be preferred? Why should he, the basis of whose claim rests upon the culpable negligence of the agents of the corporation ask to have the obligation of a contract violated and destroyed in order that such a claim should be preferred? In no other marshaling of claims either against individuals or against corporations could he successfully assert priority. His demand is of a lower standing in the forum of morality than that of a simple contract obligation, and could not in legal tribunals rank with an unsecured contract obligation—until it had been reduced to judgment. It seems to us unsound to argue that accidents and injuries must occur in the

operation of a railroad, and therefore the liability to pay for such injuries becomes an operating expense,—that no railroad system can be conducted without incurring such liabilities, and therefore they are the necessary incidents to operation, and must be given preference over specific liens. The premise is not correct. The law does contemplate that railroads can be conducted without such injuries happening. If they are casualties and mere accidents, and cannot be guarded against, a railroad company is not liable for them. Such injuries the law looks upon as inevitable, and being inevitable, grants immunity from liability. But beyond this line the law regards the act or omission which caused the injury, preventable, and its omission or commission inexcusable. It is because it is preventable, and since the existence of the cause producing the injury is preventable, the law holds the corporation financially responsible for it. Therefore, instead of dealing with the carelessness of the agents and operatives of railroad companies, which occasions such injuries, as inevitable, the law conclusively, on the contrary, presumes them preventable, and that the observance of reasonable care and precaution will prevent them. Thus, in the nature of things, the only line of distinction known to the law is the injury which reasonable skill and foresight cannot guard against, and that which reasonable diligence and precaution will prevent. The carelessness that gives rise to liability is not a part of the operation of the road, but is a departure from it. As stated by the courts, such misfeasance or nonfeasance does not tend to keep the road in operation, but on the contrary tends to prevent it being operated, and if repeated a sufficient

number of times would be destructive of its operation. To allow a claim thus arising to displace the mortgage lien would in effect be to make the mortgage bondholders of a railroad company guarantors of every person dealing with it, either as passengers, operatives or otherwise, to the full extent of the mortgage security. Without the power of employing or discharging, they would assume all the responsibilities of the principal to the extent of the security. Such a rule, instead of tending to keep the railroad a going concern would tend to prevent its being an existing concern. It would place a person having a mere claim to unliquidated damages not only on a higher plane of protection than the general contract creditor of the railroad company, but also above that creditor who furnished the means for the construction of the road and who had in addition taken a mortgage upon its properties as a specific security.

We respectfully submit that neither upon the precedents of the adjudged cases nor upon principle can such a doctrine be maintained.

Respectfully submitted,

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HERBERT B. TURNER, *Of Counsel.*

No. 288.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

Appeal from the Circuit Court of the United States, for the District of Washington, Northern Division.

Brief of Appellees on the Merits.

JAMES HAMILTON LEWIS,
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ORMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE.

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BRIEF OF APPELLEES ON THE MERITS.

As will be apparent to the court, any elaborate discussion of this question in the abstract can add nothing to the force of the position asserted. But if well taken, it is so because of an established equity, and not because of any philosophy or comparison of respective views of different courts pro or con.

I.

As seen by the record and the briefs, this is a cause where the court allowed the claims of the appellees and

gave them preference to the mortgage, exercising that right within the equity power of the court. Like all advanced ideas of equity and new theories moulded into practice by the necessity of the institutions and the customs of affairs; this peculiar equity has had to move gradually, by being accepted by the court upon the reason of each particular case and the circumstances surrounding each particular case. The equities attaching to it, the burdens borne by all parties, the privileges which one is seeking over the other, the vast or limited advantage which a mortgagee may have by holding the property, the greater or less embarrassment or wrong there may appear to be done to the claims by the mortgagee taking possession of the property,—all of these go into the consideration of an equity court in order to reach the conclusion when it is equitable to attach to the privilege of the mortgagee in taking possession of the property certain burdens and limitations. In each of these cases the court is quite the sole judge. It is the exercise of the equity discretion which in nearly all cases must be left to the court to be drawn from the conditions surrounding it, and must necessarily be left uninterfered with in ordinary instances certainly, lest we wholly destroy what the word "discretion" in equity is meant to confer and convey.

II.

It must be conceded, notwithstanding some circuit court rulings, that the highest courts of this country have announced the doctrine respecting railroads, that where a mortgagee takes a mortgage upon such he does it with a consciousness of all existing liens and burdens surrounding such a contract, and assumes by reason of

such knowledge to contract in special reference to such privileges as a court of equity may have in treating claims which ordinarily arise in the operation of a railroad, and also to have attached as a burden or limitation to his exclusive privilege in taking charge of the property upon a mere default of interest, the burden of discharging certain claims which would have been paid through legal process had the morgagee not assumed such peculiar prerogative and sought the court to enforce it, to-wit: the taking the full charge and control, before foreclosure or decree, of the property.

With this contract and privilege as a part of his undertaking, it is but natural that he should accept its exercise at any time where the circumstances justify the exercise of that discretion. It is now the recognized privilege of a court, to use the exact words of the law, that is to say:

"When a court of chancery appoints a receiver of "railroad property, it may impose such terms in refer- "ence to the payment from the income, during the re- "ceivership, of outstanding debts for labor, supplies, "equipment or permanent improvement, *or other charges* "*upon the property as may under the circumstances of* "*the particular case appear to be reasonable.*"

Fosdick vs. Schall, 99 U. S., 235.
Mittenberger vs. Logansport Ry., 106 U. S., 286.
Union Trust Co. vs. Souther, 107 U. S., 591.
Union Trust Co. vs. Midland Ry., 117 U. S., 434.
Thomas vs. Peoria R. R., 26 Am. & Eng. Ry. Cases, 381.

Addison vs. Lewis, Receiver, etc., 9 Am. & Eng. Ry. Cases, 702; S. C., 75 Va., 701.

20 Am. & Eng. Enc. of Law, p. 417 (§3); p. 426 (§3), et seq.

19 Am. & Eng. Enc. of Law, p. 758.

III.

It appears in this case that at the time of the appointment of the receiver the order for these preferences and for the payment of these claims was not made, but immediately thereafter upon the matter being called to the court's attention by petition, to-wit: that the claims were outstanding, that receiver's certificates had been ordered to pay the claims, that judgment had been duly obtained, etc., *and upon the further petition stating that the company had in its possession, by its report, and the receiver then held more than enough money to pay its interest and still have a surplus sufficient to pay these claims.*

(See paragraph 6 of Petition for Payment, Transcript, page 4.)

This paragraph not denied by the company defendant nor the appellant trust company; but, as must govern this court, all the way through such allegations stand admitted as facts; and upon this alone, excluding every other consideration in this case, the court had a right to make this order against the receiver. It was as though made against a fund which was in excess of debts.

Therefore, at any time subsequent to the appointment of a receiver within the wise discretion of the court it had a right to make the order made in this cause. This

is certainly the advance doctrine and the recognized doctrine stated in the words of the law:

"If no such provision [that is, provision to pay the "claims previously existing] be made in the order ap- "pointing the receiver, a court of equity may at any "time during the progress of the cause direct the pay- "ment."

Fosdick vs. Schall, 99 U. S., 235.
Poland vs. R. R. Co., 52 Vt., 144.
Farmers' L. & T. Co. vs. Vicksburg Road, 33 Fed., 777.
19 Am. and Eng. Enc. of Law, pp. 758-9.

IV.

Particularly is this true when, as the record here discloses, the mortgagee after default in the interest "is suffered to remain in possession and incur these debts in operating the road, and the mortgagees cannot take possession of the property through receivers and assert their mortgage in preference to *these expenses of operating*, especially if the mortgage itself provide that the mortgagee might remain in possession, operating the road and paying its current expenses."

Williamson vs. Washington City Road, 1 Am. and Eng. Ry. Cases, 489.
Turner vs. Indianapolis Road, 8 Bissell, 315.
Lehigh R. R. Co. vs. Central R. R. Co., 34 N. J. Eq., 88.
Poland vs. R. R., 4 Am. & Eng. Ry. Cases, 410. S. C., 52 Vt., 144.
19 Am. & Eng. Enc. of Law, p. 758-9.

V.

But it appears also from the undenied petition, and from the uncontroverted facts, that "the current earnings of the road had been previously used by the mortgagee for the payment of its interest, while the same should have been applied to the expenses of the operation; and under such circumstances it is the right of the court at any time in the exercise of its equity jurisdiction to charge against the property the restoration of this fund to any extent which the fund may not exceed, and order that the manner of this restoration shall be by the payment of certain designated claims.

Trust Co. vs. N. Y., etc., 25 Fed., 800.
Burnham vs. Bowen, 111 U. S., 776.
(17 Am. & Eng. Ry. Cases, 308.)
Fosdick vs. Schall, 99 U. S., 233.
Huidekoper vs. Locomotive Works, 99 U. S., 258.
Addison vs. Lewis, 75 Va., 701.

The true rule being that if the earnings are deferred to the payment of interest, or to any other matter not properly operating expenses, they must be returned to the current earnings fund and may be applied to the payment of the claims made payable therefrom.

Illinois Midland R. R. Co. vs. Trust Co., 117 U. S., 434.
Trust Co. vs. Morrison, 125 U.S., 591.
Railroad vs. Cleveland et al., 125 U. S., 658.
Wood vs. Company, 128 U. S., 416.
Easton vs. Road, 38 Fed., 12.
Trust Co. vs. Road, 33 Fed., 778.
Calhoun vs. Road, 9 Bissell, 330.

VI.

But of late, notwithstanding some intimations of the circuit to the contrary, the Supreme Court of the United States have particularly held that claims such as these before the court were proper subjects of preference, and proper subjects of just such order as is complained of here, particularly where the long-standing of the claims and their nature were such that in the exercise of an equity discretion it would be but just to order the payment from the mortgagee who had permitted the road to remain in the hands of the mortgagor, being run and incurring these expenses in the operation of the road, and waiting until after the claims had passed to judgment and from judgment into an order, and then in no wise denying the priority or justness of the claims, seek to absorb the whole of the property to the subordination of the claims.

We invite particular attention to the opinion of the learned court below in this cause; also to the copious decision where Chief Justice Waite first urges this equity in

Fosdick vs. Schall, heretofore cited,

and the further recognition of just such claims in the case of

Trust Co. vs. Midland R. R. Co., 117 U. S., 434,

the decision proceeding, among other things, to say:

"After the first mortgagee had appeared and answered "an order was made, *but not on prior notice to it*, au- "thorizing the receiver to issue certificates," etc.

To these priority is given. In this case the court has occasion to discuss the feature, which is made an item

by the appellant, that it had no notice of the hearing in this case; that such was not necessary, and if necessary when it came it had all the notice then that the court would exact. And proceeding upon the merits of the order which the court had made, allowing preferences, the court says, in reply to the contention that such could not be allowed:

"It cannot be affirmed that no items which accrued "before the appointment of a receiver can be allowed in "any case. Many circumstances may exist which may "make it necessary and indispensable to the business of "the road and the preservation of the property, for the "receiver to pay pre-existing debts of certain classes, out "of the earnings of the receivership, or even the *corpus* of "the property, under the order of the court, with a prior- "ity of lien. Yet the discretion to do so should be exer- "cised with very great care. The payment of such debts "stands, *prima facie*, on a different basis from the pay- "ment of claims arising under the receivership, while it "may be brought within the principle of the latter by "special circumstances. It is easy to see that the pay- "ment of unpaid debts for operating expenses, accrued "within ninety days, due by a railroad company sud- "denly deprived of the control of its property, due to op- "eratives in its employ, whose cessation from work sim- "ultaneously is to be deprecated, the interests both of the "property and of the public, and the payment of limited "amounts due to other and connecting lines of road for "materials and repairs, and for unpaid ticket and freight "balances, the outcome of indispensable business rela- "tions, where the stoppage of the continuance of such "business relations would be a probable result in case of

"non-payment, the general consequences involving "largely, also, the interests and accommodation of travel "and traffic, may well place such payments in the cate- "gory of payments to preserve the mortgaged property "in a large sense, by maintaining the good-will and in- "tegrity of the enterprise, and entitle them to be made "a first lien."

And it will be observed in that same decision that many of the items and things referred to as the proper subject of such prior claim, we find the following stated by the court:

"The strenuous contention on the part of the Paris "and Decatur bondholders is that a court of chancery "had no power, by a receiver and without their consent, "to create, on the *corpus* of the property, any lien taking "priority over the mortgage lien. But these bond- "holders were represented by their trustees, the Union "Trust Company. It filed a bill in the federal court as "early as December, 1876, to foreclose the Paris and "Decatur mortgage; and it was made a party on its own "petition, to the suit in the state court, in September, "1877. The Paris and Decatur mortgage provided that "in case of default for six months in paying interest on "the bonds (and such default occurred at latest on Jan- "uary 1, 1876, and the six months expired July 1, 1876, "more than three months before any order was made "on which any of the certificates were issued), all the "bonds should become due and the lien might be en- "forced, and the trustees might enter on the property "and operate it till sold, and make all needful repairs "and replacements, and such useful alterations, addi- "tions and improvements to the road as might be neces-

"sary for its proper working, and pay for them out of "the income; and also that in case of default so continu- "ing, the trustee might foreclose the mortgage by legal "proceedings or sell the property by public auction; "and should, in case of such sale, deduct from the pro- "ceeds all expenses incurred in operating, managing or "maintaining the road or in managing its business, and "thereafter apply the proceeds to pay the bonds. In "the face of these provisions of the mortgage under "which the bonds are held, and of the facts before re- "cited as to the negligence of the trustee all the while "the property was in the hands of the court, it does not "at all comport with the principles of equity for the "bondholders now to insist that the want of affirmative "consent by them or their trustee could paralyze the "arm of the court in the discharge of its duty. The "want of that aid which it was the duty of the trustee "and the bondholders to give to the court in discharg- "ing its responsible functions, with the road openly in "charge of the receiver and being run by him, and his "acts plain to view, and the interest of all the bonds in "arrear, cannot be urged to a court of equity as a "ground for denying its power to do what was thought "by it best for the interests of all concerned, including "even those who thus willfully stood aloof.

"The appellants Borge and others also complain of "provisions in the final decree, giving priority over the "Paris and Decatur bonds to just and equitable propor- "tions of the following items: 1, amount of wages due "employes of receivers, Dole, Reese and Genis, as "shown by schedules J and K of the report of the com- "missioner, the total amount being $76,820.90; 2, the

"indebtedness due from the receivership to railroad "companies, as shown by schedule L of the report, "amounting to $84,615.21; 3, the general indebtedness "of the receivership, as shown by schedule M of the "report, under the head of supplies, amounting to "$67,787.76, and under the *head of* '*damages*,' amount- "ing to $5,871.04, and forty-four items under the head "of 'miscellaneous,' amounting to $32,937.49; * * * "5, four claims on intervening petitions, allowed at "$11,642.29; 6, amount of wages due employes of the "Illinois Midland Company within six months imme- "diately preceding the appointment of the first receiver, "as shown by schedule H of the report; such equitable "portions of the receiver's indebtedness and of the six "months' labor claims to be ascertained in the manner "provided by the decree."

To which the court further says:

"The claims embraced in the six items have been "carefully scrutinized and reported on favorably by the "commissioner, and allowed by the Circuit Court, "within and in accordance with the principles above laid "down, and we think that all of them, including the "'six months' labor claims,' were properly allowed."

And this contention and the recognition of this equity and this discussion on the part of the court, while we see various views in various districts, each judge following the views applicable in his particular circuit, still the trend of the cases on the basis of reason and equity are in harmony with this view and sustain it, as will be seen by a reference to the cases themselves, first referring to the cases mostly relied on by appellant:

Kneeland vs. Trust Co., 136 U. S., 89,

recognizing the doctrine of

Hale vs. Frost, 99 U. S., 389.
Barton vs. Barbour, 104 U. S., 126.
Trust Co. vs. Souther, 107 U. S., 591.
Burnham vs. Bowen, 111 U. S., 776.

In the last case cited the court say:

"The receivership was at the instance of a judgment "creditor, and was with a view of reaching the surplus "earnings for the satisfaction of his debt."

And *referring particularly to this Kneeland* case showing why it is an exception to the cases heretofore cited to the court, of railroad companies where the mortgagees take possession against which there is had such conditions as an equity court has a right to impose, the court continuing says:

"It [meaning the receivership in that particular case] "*was not at the instance of the mortgagees, nor were* "*they seeking foreclosure of their mortgages.* They "were asking nothing at the hands of the court. They "were not asking it to take charge of the property."

Here is the distinction.

In the case now before the court for consideration, the mortgagee did seek foreclosure, does ask the court to take charge of the property for it, and was asking something at the hands of the court as a privilege. It was to this privilege the court had a right to attach the equitable burden which in its discretion it has so done. This order is made against the receiver and against the property, because of the management by the court of

the property and the exclusion of all creditors; and we insist that the following words of the court showing that the court appointing the receiver has a right to put such conditions upon that appointment, and that those conditions recognized here are the conditions which had previously been imposed and recognized by the cases heretofore cited, which and only in the line of which are again recognized and indulged in by the lower coart.

Further in the Kneeland case, therefore, (at page 383, Co-Op. Series) say the court:

"* * * When a court appoints a receiver of *rail-*
"*road property*, it has no right to make that receiver-
"ship conditional on the payment of other than those
"unsecured claims *which by the rulings of this court*
"*have been declared to have an equitable priority.*"

It will be seen that it was upon the facts of that particular case by which the exception to the rule of equity previously adopted was permitted to exist.

Now in the further case which has been the subject of discussion by the appellant, Thomas vs. Car Co., 149 U. S., 95, this was another instance of rent, and upon the facts in that case purely did the court except it from the ruling of the equity. Mr. Justice Shiras refers particularly to Miltenberger vs. Road, 106 U. S., and reaffirms that doctrine, and notesthe exception asserted and recognized in Kneeland vs. Trust Co., and they refer to the exception that in the case under consideration, say the contract between the car company and the railroad company was that the car company reserved the right to terminate its contract and take possession of

its cars; that it knew of the existence of the outstanding bonds, and protected itself wholly and solely upon the method agreed, to wit, the taking back of its particular property, not by any agreement implied or otherwise *to receive payment*. The case is therefore widely different from the one under consideration in this court, and the reasons offered there for excepting it from the rule of the new equity, heretofore urged, is palpable. (See 149 U. S. Co-Op. Series, page 113.) The court following and saying:

"This company [meaning the car company] must be "treated as having full notice of the financial condition "of the railroad, and as having leased the cars without "the expectation of displacing the priority of the mort-"gage liens."

And here again the court, referring to the lower court's decision, says:

"The court then states the general principles which "have been established by the decisions of this court as "to charging the income of the receivership with the "payment of certain classes of liabilities of the railroad "company incurred prior to the receivership, and their "payment from the proceeds of the sale of the railroad "prior to the mortgage indebtedness."

Here the Supreme Court recognizes the rule previously obtaining, and which, under proper facts, they still assert by acquiescence is existing for a court to enforce under conditions submitting it to its discretion.

These views, such as we urge, have been followed by the courts on circuit in the following cases:

Farmers' Loan & T. Co. vs. Kansas City W. N. R. R., 33 Fed., 187; opinion by Judge Caldwell. See full note with collection of cases, pages 192-3.

Hook vs. Bosworth, 64 Fed., 445.

Clark vs. Railroad, 66 Fed., 806.

Farmers' L. & T. Co. vs. N. P. R. R., on the petition of O'Brien, 71 Fed., 247.

These cases were followed by opinions by Judge Thomas and also supported by opinions of Judge Caldwell from Dakota, which I trust will be out by the time this cause is submitted to the court, wherein it was held that debts for coal contracted previous to the receivership could be attached as a prior lien. Also where it was held by Judge Caldwell, following his first decision of Dow vs. Memphis Railroad, 20 Fed., that for a smash-up of cars and wagons occurring in a collision in the operation of the road previous to the appointment of the receiver, these could be made preferred claims if in the discretion of the court the circumstances seemed to require it; and here it was held, as in the 53d Federal, that such an order attaching itself as a condition to the receivership could be made at any time.

And we insist that upon the facts of this case to the order made the mortgage company has no right to complain and should not be heard to appeal, and that by the decisions of the highest court such doctrine is asserted; and irrespective of the merits or demerits of the order of the lower court, this mortgage company has no right or standing in this court to assert any objections to it.

Masterson vs. Herndon, 10 Wall., 416.

Swan vs. Wright, 110 U. S., 590.

Williams vs. Morgan, 111 U. S., 590.

Its attitude is very much the attitude of a purchaser under a decree; the purchaser takes what is sold under the decree with all its conditions. This mortgage company takes charge of this property by its demand under and connected with such conditions as are imposed upon the receivership at the time or subsequently.

See full case,

Farmers' Loan & Trust Co. vs. K. C. W. & N. R. R., 53 Fed., 182, opinion by Justice Caldwell, page 189.

See full note by Maurice M. Cohn, pages 192 to 197.

We respectfully submit that if for any reason this case shall not be dismissed on appeal, that the judgment should be affirmed with costs to appellees.

Respectfully submitted,

JAMES HAMILTON LEWIS,
Solicitor for Appellees.

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
Of Counsel.

No. 288.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

Appeal from the Circuit Court of the United States, for the District of Washington, Northern Division.

Appellees' Notice and Motion to Dismiss.

JAMES HAMILTON LEWIS,
Solicitor for Appellees.

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
Of Counsel.

ROWMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE.

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*, vs. PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*	No. 288.

To the Farmers' Loan & Trust Company, appellant, and to Messrs. Struve, Allen, Hughes & McMicken, your attorneys of record:

You and each of you will please take notice that the appellees will call up for hearing the annexed motion to dismiss your appeal on the grounds therein stated, on the 11th day of June, 1896, in the court room of the Circuit Court of Appeals of the United States for the Ninth Circuit, in San Francisco, California, at the hour of 10 o'clock, A. M., or as soon thereafter as counsel can be heard.

JAMES HAMILTON LEWIS,
Solicitor for Appellees.

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
Of Counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees*. } No. 288.

Come now the appellees herein and respectfully move the court that the appeal herein be dismissed, and assign as grounds of such dismissal the following:

1st. That the record on appeal in this cause has not been properly certified to this court and there is no evidence before this court that a complete record on appeal has been brought up, or one comprehending all records necessary to the hearing of the appeal.

2nd. That the order from which appellant has appealed, to-wit: the order of December 18th, 1895, is not appealable because not a final order.

3rd. For the reason that it appears by the record in this court that two other parties, to-wit: Andrew F. Burleigh, Receiver, and the Northern Pacific Railroad Company, both of whom were defendants below and the former of whom was included in the order appealed

from, have not been joined in this appeal or severed from it by summons and severance, or have had any notice whatever by citation, or otherwise, of the appeal herein.

4th. That other defendants, parties to the record and interested in the cause, have never been served or notified of the appeal or made parties thereto.

I.

Examining the foregoing grounds in turn, we find the clerk's certificate in this case to be (Transcript, p. 48), "that the foregoing * * * pages are a full, true and correct transcript of the record on appeal." We do not believe that so meagre a certificate has ever before been accepted. It does not at all comply with the requirements of Rule 14 of this court (Subdivision 3). The word *complete* has been necessary to a clerk's certificate on appeal for the greater part of a century under the appellate provisions of the United States Courts.

Keene vs. Whitaker, 13 Peters, 459.
Redfield vs. Parks, 130 U. S., 623.

If to the words *full*, *true* and *correct* the clerk had added "of all the papers on file," or "of all proceedings in said cause," there might be something to stand upon.

What the clerk has to send up by statute, and the rule adds more, is defined in Section 750 of the Revised Statutes, where his duties as to making up final record for the purposes of the lower court are defined. In section 698, his duties as to this final record and other records when the cause is appealed are laid down, and in the latter section he is directed to send up along with

other things such papers "as may be necessary on the hearing of the appeal." The clerk in this instance has not certified either that he has sent up a *complete* record of anything or that it is a copy *of all* the proceedings in the cause as required by Rule 14, or that it comprehends everything *necessary to the hearing of the appeal*, and we believe that even if the words used by the clerk in this instance were so far improved that the word *complete* should be substituted for the less comprehensive word *correct*, it would not be sufficient, and that in addition to the words "full, true and complete," a certificate should contain "of all the papers, etc.," or "of all proceedings," or "of all the record necessary to the hearing of the appeal," and we do not think a case can be cited in which a certificate has been accepted without these words.

II.

The original order in this case was made on the 16th day of August, 1894 (Transcript, p. 5). This order required the railroad company's receiver to make payment of the claims in cash or certificates within thirty days. Subsequently the complainant's solicitors asked leave to show cause why this order should be set aside, and this leave was granted them. The matter then hung on until the 18th day of December, 1895, when their motion to vacate the original order of August 16, 1894, was denied (Transcript, p. 12).

Under this state of facts we believe the final order in the case to have been the original one. The motion to vacate that order would indeed suspend the running of the appeal period, and until it was disposed of the ap-

peal time would not count against complainants or others, but when it was disposed, of the thing to complain of and appeal from was the order originally entered, whereas, in this case the appeal is from the order of December, 1895 (Transcript, pp. 31 and 46).

An appeal will not lie from a refusal to open a decree.

McMicken vs. Perin, 8 Howard, 507.
Steines vs. Franklin Co., 14 Wallace, 15.
Wyle vs. Coxe, 14 Howard, 1.
Brackett vs. Brackett, 2 Howard, 238.
Andrews vs. Thum, 72 Fed., 290.
Bondholders, etc. vs. Toledo, etc., R. R., 62 Fed., 166.

It may possibly be contended that because the court made a slight modification of the original order when it denied the motion to vacate (Transcript, pp. 12 and 13) that it in effect made a new order which is the final one here. We do not think, however, that this can possibly be contended. The changes, it will be noticed, simply are that instead of paying interest on the petitioner's claim, as provided for in the original order, the receiver shall not pay interest, and that instead of depositing receiver's certificates, as the original order provided, he shall pay the petitioners in cash. The former of these modifications is so manifestly in the interest of the parties now appealing that it could hardly be said that they had anything in that that they could complain of or that it constituted a new order to their prejudice. As to the latter modification, that changing by certificates to payment in cash, it cannot be clear in what way complainants are prejudiced by that either, and indeed, regarding the receiver as an officer of the court, these

modifications are nothing more than supplementary orders, which the court, it seems to us, would have had the power to make *ex parte*. The original order of August 16, 1894, disposed of the whole question as to the liability in point of law and the mere manner in which the receiver should make the payment seems so unimportant a part of the order that we do not think the supplementary instructions of the judge in this respect could constitute a new judgment, order or decree.

It is apparent from the record that the order which alone could aggrieve the appellant, and which was the order ordering the payment to these appellees of the money due upon their judgments, was made and entered August 16, 1894. The attempted appeal in this case is taken January 20, 1896, more than one year and five months expiring; in other words, taken a year after the time had expired for the allowance of the appeal.

Clearly there is no law for this and the appeal should be dismissed.

It will not suffice to say that appellant was not a party to the petition; it was not called on in anywise to be. It only related to the railroad, to the receiver. It concerned but the receiver. It was an order made by the court in the management of the property in the hands of the court through the receiver. If any outside person is aggrieved he could come in and make such known by proper proceeding. That the appellant subsequently came in by a motion seeking to have the order set aside did not affect its right to come in at the same time it made such motion and avail itself of the privilege of appealing, and obtain the permission to

intervene for the purpose of appealing, and if it had any rights or concern in the matter, its right would have been to appeal within the proper time if the receiver did not so desire. The appellant did not come in the cause on the 16th day of September, 1894, a month later than the date of the order, asking for time in order to show that the order was not properly made, and obtained until October 3rd, 1894, to make an order to vacate, and on November 16, 1894, made the order to vacate.

(See Record, pages 5, 6, 7, 8 and 10.)

True in all these intermittent periods had the appellant any rights its rights would have been to appeal from the order, as it could but stand in the place of the receiver. It has not done so until eighteen months after the order which it complained of. Surely this will not do, for it is without the meaning of the law; it is contrary to the limitations of the statute.

The appeal cannot be sustained and must be dismissed for the reasons:

1st. That it is not taken in time, to-wit, within six months from the final order or decision in the cause.

2d. Nor within one year from the date of the decision giving a right or asserting a privilege to any party in the cause.

From the points heretofore made it is clear that the decision refusing to vacate the order, which decision was made on the 18th of December, 1895, is not the final order in the cause, and is not the order which gave the plaintiffs their rights as against the receiver or the appellant, and therefore is not the proper one to have ap-

pealed from, and is not therefore an appealable order or decision. And for these reasons it is apparent that the appeal should be dismissed.

III.

And now upon this point, No. 3, we insist that this appeal, irrespective of all other questions, must at once be dismissed, and an order affirming the decision of the lower court must follow as of course.

This appeal should be dismissed because it is heedlessly taken, it is carelessly taken—taken without regard to the rights of the appellees or of the persons interested in the cause or of the parties to the record. That is to say,

(1) Parties interested in the judgment are not notified of the appeal;

(2) Parties to the record are not made parties to the appeal;

(3) Parties against whom the judgment is made are not made parties to the appeal.

(4) Parties who have a right to be heard as to the affirmance or reversal of the decision are not made parties to the record.

(5) No citation is served upon all the parties to the record.

(6) No citation is served or notice given to parties who are interested in the decision, and against whom the decision is made to operate.

(7) There has been no severance as to the appellant.

(8) There has been no refusal in behalf of the other parties to the record to appeal.

(9) There has been no order allowing the appellant to appeal alone, for any cause shown on the record or at all.

(10) Seven parties appear as necessary parties in order for the adjudication and the order to be executed, only three of them, to-wit: the beneficiaries under the judgments, are at all even notified of the appeal. The remaining four are at liberty the one after the other to maintain separate appeals against these appellees if the present course adopted by the appellant can within any form of reason or precedent be allowed.

It is to be observed on the record that the order complained of is made in the title of a cause as follows: The Farmers' Loan and Trust Company vs. The Northern Pacific Railroad Company *et al.*

(See Transcript, pages 5 and 6.)

That the motion of appellant for order extending the time for further objections on its part was in the same cause, to-wit: The Farmers' Loan and Trust Company vs. The Northern Pacific Railroad Company *et al.*

(Pages 6 and 7 of Transcript.)

Also the order extending the time at the appellant's instance is in the cause of The Farmer's Loan and Trust Company vs. The Northern Pacific Railroad Company *et al.*

(Pages 9 and 10 of Transcript.)

Also the order calling the same up was in the same cause. And it will be further observed that the order

denying the motion to vacate *made on the 18th day of December, 1895*, is likewise in the cause of the Farmers' Loan and Trust Company vs. The Northern Pacific Railroad Company *and others*.

It is now apparent to the court that the *et als.*, to wit, the others, were some other defendants in the cause who were parties to all the motions and all the proceedings, parties to the order granting the receiver's certificates, and parties to the order refusing to vacate the same; yet,

They are not named;

They are not served;

They are not even present before the court that the court may see who they are, the nature of their interest or what attitude they occupy to either the claimants or the appellees.

This appeal cannot be sustained as long as such defendants are upon the record in the name of "*and others*," without their personnel being disclosed, their attitude disclosed, their relation shown, and an order and notice served upon them duly in the cause bringing them before the court.

This has so freely been asserted by the highest courts of the country, and so frequently, that no more than a reference to the doctrine is needed at this time, which we also assume to offer the court, and the law determining the motion on this one division of this ground alone is as follows:

The Supreme Court, by Chief Justice Marshall, first announced the principle which has governed the court to this day.

"The present writ of error is brought by Mary Deneale 'and others,' as plaintiffs; but who the others are cannot be known by the court, for their names are not given in the writ of error, as they ought to be. Mary Deneale cannot *alone* maintain a writ of error on this judgment; but *all the parties must be joined to give a proper judgment on the case.* The present writ of error must therefore be dismissed for irregularity."

Deneale vs. Stumpf Executors, 8 Peters, 526.

The principle of this case was thereafter affirmed by the court, Chief Justice Taney delivering the opinion,

Heirs of Wilson vs. Ins. Co., 12 Peters, 140, 141.

"The counsel for the defendant in error has moved to dismiss this case; 1st, because no persons are named as plaintiffs in the writ of error, but they are described generally in the writ as 'The heirs of Nicholas Wilson'; 2d, If this general description is sufficient, yet it appears by petition for the writ, which is referred to in the appeal bond, that the widow did not join in the application for the writ of error; and as the judgment against the defendants was a joint one, they must all join in a writ of error, unless there is a summons and severance."

"We think the writ of error must be dismissed on both grounds, and that the points raised have already been decided by the court. In the case of Deneale vs. Stumpf, 8 Peters, 526, the writ of error issued in the name of 'Mary Deneale, the executrix of George Deneale and others.' It was dismissed on the motion of the defendants in error, and the court said, 'the present writ of error is brought by Mary Deneale *and others* as

plaintiffs, but who the others are cannot be known by the court, for their names are not given in the writ of error as they ought to be. Mary Deneale cannot *alone maintain a writ of error on this judgment; but all the parties must be joined and their names set forth, in order that the court may proceed to give a proper judgment in the case.*' In the case now before the court the name of no one of the parties is set forth in the writ of error; and, according to the rule laid down in the case referred to, this writ of error cannot be maintained."

"In both of the cases referred to it appears that the motions to dismiss were not made at the first term, or at the time of appearance in the court; but each of the cases had been pending here two years before the motion was made. The rule of this court therefore is, that where there is a substantial defect in the appeal, or writ of error, the objection may be taken at any time before judgment, on the ground that the case is not legally before us, and that we have no jurisdiction to try it. It follows, that the writ of error in the case under consideration must be dismissed."

Wilson vs. Ins. Co., 12 Peters, 141.

The Supreme Court has decided that this principle applicable to writ or error, is also applicable to appeals in equity.

Chief Justice Marshall, for the court saying:

"A motion is now made to dismiss this appeal, because the decree being joint, all the parties ought to join in the appeal.

"Upon principle it would seem reasonable that the whole cause ought to be brought before the court, and

that all the parties who are united in interest ought to unite in the appeal. We have found no precedent, in chancery proceedings, for the government in this case. But in the case of Williams vs. The Bank of the United States, 11 Wheat., 414, which was a writ of error sued out by one defendant to a joint judgment against three, the writ was dismissed, the court being of the opinion that it had issued irregularly, and that all the defendants ought to have joined in it.

"By the Judicial Act of 1789, decrees in chancery pronounced in the Circuit Court could be brought before this court only by writ of error. The appeal was given by the act of 1803. The act declares, 'that such appeal shall be subject to the rules, regulations and restrictions as are prescribed by law in cases of writs of error.

"Previous to the passage of this act, the decree under consideration could have been brought into this court only by writ of error, in which all the defendants must have joined. The language of the act which gives the appeal appears to us to require that it shall be prosecuted by the same parties who would have been necessary in the writ of error. We think also that the same principle would have been applicable from the general usage of chancery, to make one final decree binding on all parties united in interest.

"The appeal must be dismissed, having been brought up irregularly."

Owings vs. Kincannon, 7 Peters, 402.

The settled practice of the court is stated and again announced by Judge Miller (speaking for the court):

"But many cases have been dismissed by this court,

because the writ of error described either plaintiff or defendant as 'A. B. and others,' or 'A. B. & Co.,' or other partnership style, or as 'Heirs to C. D.,' and such other descriptions as did not give the names of all other persons who were supposed to be brought before the court by the writ. Of late years these cases have simply been dismissed upon the authority of previously adjudged cases, without giving other reasons for so doing."

Mussina vs Cavazos, 6 Wall., 361.

And reviewing the cases and their *rationale*, he continues:

"Early in the history of the court it was ruled that unless all the parties in the court below, to a joint judgment or decree, *were made parties in this court* by the writ of error or by the appeal, the cause would not be entertained. This was first held as to judgment at law, in the case of Williams vs. Bank of United States, and to decrees in chancery, in the case of Owings vs. Kincannon. At the next term of the court after this last decision, we have the first of the class of cases to which we have alluded. It is the case of Deneale vs. Stumpf's Executors. The writ described the plaintiffs in error as 'Mary Deneale and others,' and the reasons given for dismissing it are two: 1st, that all the parties against whom the judgment was rendered *must join* in the writ, which is not done by naming some of them merely as 'others;' and, 2nd, that *the names should be set forth that this court might render the proper judgment in the case.* The opinions in the three cases last cited were delivered by C. J. Marshall."

"The next of this class of cases is that of Wilson's Heirs vs. The Insurance Company, in which the court holds, that a writ in the name of the the 'Heirs of Nicholas Wilson' must be dismissed. The court simply says that this is done on the authority of Owings vs. Kincannon, and of Deneale vs. Stumpf's Executors. The subsequent cases are all based on the authority of these decisions. In all of them it appeared by the writ that there were parties to the judgment below not personally named in the writ."

Mussina vs. Cavazos, 6 Wall., 362.

See also

Miller vs. McKenzie, 10 Wall., 582.
Smith vs. Clark, 12 How., 327.
Smyth vs. Strader, 12 How., 21.
Protector, 12 Wall., 700.

In this last case the words "and others" were held of themselves to disqualify the appeal; and that the persons for whom these words stood should be named and brought before the court and their interest disclosed, and that the failure so to do was of itself enough to give the court no jurisdiction of the appeal, and that such a point could be raised at any time previous to the final judgment in the appellate court and would be availing.

Now, as to the second subdivision of this motion, we must respectfully insist that there can be no answer nor avoidance of the conclusion that for the reasons here and now stated this appeal must be dismissed.

Upon a reference to the record it is apparent that the Northern Pacific Railroad Company was the defendant

against which the order was made; that H. C. Rouse, H. C. Payne and T. F. Oakes were receivers of the said road against whom the order was made to operate.

(Transcript, pages 2, 16.)

And also that A. F. Burleigh was the receiver subsequently representing all the other receivers and being the direct party against whom the order was enforceable, and he is a party to the judgment and to all orders made in the cause, and against whom an appeal was sought by the appellant.

(See Transcript, page 31.)

Errors were assigned against said Burleigh and the said receivers.

(Transcript, page 33.)

The supersedeas bonds were made to run in the cause against the Northern Pacific Railroad Company and Andrew F. Burleigh, receiver.

(Transcript, pages 37, 39, 43.)

And the title of the citation and of the clerk's certificate was against the Northern Pacific Railroad Company and Andrew F. Burleigh.

(Transcript, pages 46 and 48.)

And most convincing appears that the opinions of the court upon which errors are assigned are rendered in the cause of the Northern Pacific Railroad Company and Andrew F. Burleigh as defendants, and the certificate to the opinion is in the same cause with the same defendants.

Yet and notwithstanding,

(*a*) No citation is served on the Northern Pacific Railroad Company.

(*b*) No citation is served on Andrew F. Burleigh the receiver.

(*c*) No notice given to the Northern Pacific Railroad Company.

(*d*) No notice given to the receiver.

(*e*) No request to the Northern Pacific Railroad Company to appeal.

(*f*) No request to the receiver to appeal.

(*g*) No refusal by the Northern Pacific Railroad Company.

(*h*) No refusal by the receiver.

Again, there is no severance, or order of severance allowing complainant to appeal alone, or exempting the complainant in anywise from bringing before the court by due service all persons interested directly in the order appealed from.

In so far as this court is concerned, it may be, as appears from the record, that neither the Northern Pacific Railroad Company nor Andrew F. Burleigh the receiver has up to this moment the slightest knowledge that a case in which they were defendants and against whom the direct decision was made has been appealed.

Surely this course cannot be tolerated.

Shall these appellees, when this court has determined the present appeal, be subjected to another appeal by the receiver who shall say that he represents the creditors, has a right to be heard, and insists that no preference should be allowed to any person, or that it should be allowed? And then

When this is determined shall the Northern Pacific Railroad Company then be heard as to its appeal that

it has a right to have these claims paid in a certain way, and not to be charged against its general indebtedness? That it has a right to insist that it has an equity discretion, and a right that these be charged against the mortgagee taking possession of the property, as is true of one of the doctrines; and when its appeal is disposed of shall these appellees be again subjected to another appeal by the Seattle, Lake Shore & Eastern Railway Company, against which the judgment of Raskey was duly entered, it being one of the owners of part of the line used at the time Raskey was injured, and which company appears to be interested in the litigation, and a part originally of the order,

(See Transcript, page 1.)

and which appears and contends in the case by its counsel?

(See Transcript, page 2.)

Or, presenting before the court the situation of but the Northern Pacific Railroad Company and Andrew F. Burleigh, can there be any doubt but what these two defendants should have been brought before the court in this appeal, and their rights or their contentions, in so far as these appellees are concerned, be at once disposed of, that these appellees be not further subjected to the uncertainty as to whether their rights are adjudicated finally, or whether they are to be harassed with repeated appeals by these other two necessary defendants in the cause, and who are parties directly to the decree, and against whom the joint order is made? We most respectfully insist that the true doctrine of the law upon this question which justifies us in insisting

that this appeal be dismissed can be stated as the uniform practice, and as is set forth in the following cases as stated by them. We refer

First: "This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and it appearing to the court here, upon the motion of Messrs. Hall & Robinson, of counsel for the appellees, that the decree of the said District Court in this cause is a joint decree against several co-defendants, and that Patrick C. Shannon alone has appealed therefrom, *without any summons and severance from the rest of his co-defendants*, it is the opinion of this court that the case is improperly brought here. On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the appeal be, and the same is, hereby dismissed with costs."

Shannon vs. Cavazos, 131 U. S., LXXI (Appendix).

In 1892 the Supreme Court took special care to reexamine the practice and state the rule and reason of it, and said:

"Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal. Owings vs. Kincannon, 7 Pet., 399; Musina vs. Cavazos, 6 Wall., 355."

Hardee vs. Wilson, 146 U. S., 180.

And at page 181, of Hardee vs. Wilson, the Supreme Court says:

"In the case of Masterson vs. Herndon, 10 Wall., 416, it was held that 'It is the *established doctrine* of this court that in cases at law, where judgment is joint,

all parties against whom it is rendered must join in the writ of error; and in *chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed.* There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. *That the appellate tribunal shall not be required to decide a second or third time the same question on the same record.*' In the case of Wilson vs. Bank of United States, 11 Wheat., 414, the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of Todd vs. Daniel, 16 Pet., 521, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books, allowed generally when more than one person was interested jointly in the cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment was to bar the party who refused to proceed from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of

the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle it is no doubt as applicable where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case *seems to have been conscious that something of the kind was necessary*, for it is alleged in his petition to the Circuit Court for an appeal that Maverick (the co-defendant), refused to prosecute the appeal with him. We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record *that Maverick had been notified in writing to appear, and that he had failed to appear*, or, if appearing had refused to join. But the mere allegation of his refusal in the petition of the appellant does not prove this. *We think there should be a written notice and due severance, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest.* Such a proceeding would remove the objections made in permitting one to appeal without joining the other, that is, would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which the court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from, which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possi-

ble to adhere to it without hazarding the substantial rights of the parties interested."

In the case of Downing vs. McCartney, reported in the Appendix to 131 U. S., at page 98, where the decree below was joint against three complainants, and only one appealed, and there was nothing in the record showing that the other complainants had notice of this appeal, or that they refused to join in it, the appeal was therefore dismissed. Mason vs. United States, 136 U. S., 581, was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and a part of the sureties appealed and defended. The suit was abated as to two of the sureties who had died, and the other sureties made default, and judgment of default was entered against them. On the trial a verdict was rendered for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties who appeared sued out a writ of error to this judgment, without joining the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as plaintiffs in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error dismissed. In Ferbelman vs. Packard, 108 U. S., 14, a writ of error was sued out by one of two or more joint defendants, without a summons and severance, or equivalent proceedings, and was therefore dismissed.

The state of facts shown by the record brings the present case within the scope of the cases above cited, and it follows that the appeal must be dismissed.

Hardee vs. Wilson, 146 U. S., 181-183.

The court had again, in 1893, occasion to enforce the rule in the two following cases:

"It is quite clear that Inglehart's heirs could not appeal alone, without joining the other defendants as appellants, or showing a valid excuse for not joining them.

"This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so, and this must be evident upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter. Owings vs. Kincannon, 7 Pet., 399; Todd vs. Daniel, 16 Pet., 521, 523; Masterson vs. Herndon, 10 Wall., 416; Hardee vs. Wilson, 146 U. S., 179.

"Appeal dismissed."

Inglehart vs. Stansbury, 151 U. S., 72, 73.

A case which seems parallel upon all its phases and conditions, and its procedure and its record to the case at bar, and in which the conclusion is reached which we insists is the inevitable one here, is

David vs. Mercantile Trust Co., 152 U. S., 695.

The opinion is by Mr. Justice Brewer, and the facts are stated in the opinion. We copiously quote from it as follows:

"As a preliminary matter, the standing of the appellants in this court is challenged. In the court below

he was not a party to the record, either plaintiff or defendant; was neither substituted for either; filed no bill, cross-bill or answer; but was simply permitted to intervene with liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder. Assuming, under the authority of Williams vs. Morgan, 111 U. S., 684, 689, 4 Sup. Ct., 638, that this gave him a right of appeal from any decision of the circuit court affecting his interests, it did not change the ordinary rules respecting appeals, one of which is that all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal. The rule and the reason therefor are fully stated in Masterson vs. Herndon, 10 Wall., 416, and restated in Hardee vs. Wilson, 146 U. S., 179, 181, 13 Sup. Ct., 39, and need not, therefore, be again repeated. See also Inglehart vs. Stansbury, 151 U. S., 68; 14 Sup. Ct., 237. * * * Again, not only is the purchaser interested, but also the mortgagor. He may be satisfied with the sale which was made—he may believe that at no other sale would it be possible to realize so much in satisfaction of his indebtedness. At any rate, the seting aside of the sale, and the ordering of another, may affect, prejudicially or beneficially, his interests, and because of that he has a right to be heard upon the question of setting it aside. Now, the only party respondent to this appeal is the trustee. It is the only party named as obligee in the cost bond. The citation, in terms, runs to it, only; and there is no pretense that the mortgagor of the other defendants, or the purchasers at the sale, have ever been brought into this court to re-

spond to this appeal. Manifestly, it would be the grossest injustice to attempt to determine the question of the validity of this sale in the absence of these so vitally interested parties.

Neither does the appeal from the decree stand in any better condition. In a decree for the foreclosure of a mortgage, the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted to disturb such a decree, unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside, notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case, to determine that his interests would or would not be promoted by the setting aside of the decree. It is enough that in the matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense. *Ordinarily, it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor was a party to the record, the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us.* The trustee is the only obligee named in the appeal bond, and while

the citation on its face runs to all the parties to the record, it was not served on the mortgagor, the Kanawa & Ohio Railway Company; and that company has never been brought into this court and never entered an appearance here. This is fatal to the appeal. * * * So that neither in fact nor in law was he representing the corporation mortgagor in this litigation; and as that mortgagor was interested in and affected by the decree of foreclosure and sale, it should have been made a party to this appeal, and brought into this court, and because of the failure so to do the appeal cannot be maintained. For the reasons above given both appeals are dismissed."

Later the question came before the court again in

Sipperley vs. Smith, 155 U. S., 86-9,

and the court referring to its previous rulings disposes of the question in the *syllabus*, as appears in the 15th Supreme Court Reporter, page 15, as follows:

"An appeal from a judgment affirming a decree against defendants and intervenors was taken by certain of the intervenors. No application for summons and severance as to an intervenor not appealing, or any equivalent therefor, nor any order permitting severance, appeared in the record; and no application was made for the issue of citation to defendants or leave to perfect the appeal as to them, and neither they nor such intervenors appeared. Held, that the appeal should be dismissed. Masterson vs. Herndon, 10 Wall., 416; Hardee vs. Wilson, 146 U. S., 179, 13 Sup. Ct., 39; Inglehart vs. Stansbury, 151 U. S., 68, 14 Sup. Ct., 237; and

Davis vs. Trust Co., 152 U. S., 590, 14 Sup. Ct., 693, followed."

And following this decision in

Beardsley vs. Arkansas Ry Co., 15 Supreme Court Reporter, 786,

the last expression of the court is found, in which the opinion of the court by the Chief Justice is as follows:

"This appeal was perfected as to the Arkansas & Louisiana Railway Company only by the giving of bond as required by statute (Rev. St., Secs. 1000, 1012); and while the omission of the bond does not necessarily avoid an appeal, if otherwise properly taken, and in proper cases this court may permit the bond to be supplied, no application for such relief has been made in this case, nor could it properly be accorded after the lapse of nearly four years since the decree. The appeal might, therefore, well be dismissed, because ineffectual as to the complainant, Paul F. Beardsley.

"But this must be the result on another ground. To the decree Paul F. Beardsley was party complainant, and John D. Beardsley, the St. Louis, Iron Mountain & Southern Railway Company, Jay Gould, and the Arkansas & Louisiana Railway Company were parties defendant.

"It is settled for reasons too obvious to need repetition, that in equity cases all parties against whom a joint decree is rendered must join in an appeal, if any be taken; but this appeal was taken by John D. Beardsley alone, and there is nothing in the record to show that his co-defendants were applied to and refused to ap-

peal, nor was any order entered by the court, on notice, granting a separate appeal to John D. Beardsley in respect of his own interest. The appeal cannot be sustained. Hardee vs. Wilson, 146 U. S., 179; 13 Sup. Ct., 39; Davis vs. Trust Co., 152 U. S., 590; 14 Sup. Ct., 693. Appeal dismissed."

For the reasons herein stated we respectfully submit that this appeal must be dismissed, and move the court that an order so dismissing the appeal be at once made, for the reasons herein stated.

Most respectfully submitted,

JAMES HAMILTON LEWIS,
Solicitor for the Appellees.

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
Of Counsel.

ADDENDA.

AMENDMENT ATTEMPTED TO SUPPLY RECORD.

It has come to our attention while this brief was in course of print that the appellant, assuming to remedy in part what is the apparent flagrant fatality in the case, as shown by the transcript, has obtained from one of the defendants, Andrew F. Burleigh, through some one reprenting him, some written consent that the appeal be had as it is. The nature of this we cannot ascertain, because it is not in the transcript; but we have to say—

It should not be considered nor regarded for any purpose.

It is five months after the taking of the appeal.

(Transcript, page 31.)

It is five months after the date of the citation issued in the appeal.

(See Transcript, page 46.)

It is four months after the appellees have appeared in the cause, and the same has been on file and in the Circuit Court of Appeals.

Such is not within the transcript and protected with the certificate of the clerk, and as a part of the complete record; therefore, such could not be heeded for any purpose.

And even if all these objections were not well taken,

such could not be heeded for *the court is without jurisdiction of the appeal and was at the time of such attempt at amendment or supplying the record.*

For want of proper service of the appeal and proper severance, and for want of the adjudicated judgment of the lower court adjudicating such severance, this court was without jurisdiction. No amendment at this time of any form or shape, even of all the parties, could aid the cause. We respectfully submit that the law tersely stated upon such positions is that which has been affirmed as such doctrines by the Supreme Court of the United States:

(*a*) Any summons or judgment of severance must be had in the circuit court from which the appeal is taken.

Todd vs. Daniel, 41 U. S. (16 Peters), 521.

(*b*) *Any severance, therefore, must be had before the return day of the citation, and the writ of error.*

Bacon Abr., 268.
Blunt vs. Snedston, Cro. Jac., 117.

(*c*) The defects of parties plaintiff or defendant in error cannot be cured by an amendment.

Thompson vs. Crocker, 1 Salk., 49.
Walter vs. Stokoe, 1 Ld. Raym., 71.
The Protector, 11 Wall., 82.

Whatever privilege of amendment section 1005 of the Revised Statutes of the United States would permit, it has never been held to permit anything more than the amendment of form.

Here the defect is that all the defendants do not join

in the appeal, nor are they served, nor all of them cited, nor does there appear to be any severance. To ground an amendment here would be in violation of section 1005 of the Revised Statutes.

It has therefore been expressly held by this Court that the omission or defect of the parties plaintiff or defendant in error is not and cannot be amended nor supplied after the time of the citation and after the cause has been appealed, as such must have existed and the severance must have been adjudicated previous to the issuance of the citation, in order that it may be ascertained who are to be cited.

Estis vs. Trabue, 128 U. S., 225.
Ex parte Sawyer, 21 Wall., 235.

(*d*) Therefore, it is held that where there is this substantial defect in the record which cannot be amended in this Court, *this Court has no jurisdiction.*

Wilson vs. Life Insurance Co, 12 Peters, 140.

It will then of its own motion dismiss the case without awaiting the action of any party, and will do this at any time before judgment.

Hilton vs. Dickinson, 108 U. S., 165.

For the court again asserts that *all the parties against whom a judgment is entered must join in a writ of error, or there must be a proper summons and severance.*

Williams vs. Bank of U. S., 24 U. S.; 11 Wheat., 414.
Owings vs. Kincannon, 32 U. S.; 7 Pet., 399.
Wilson vs. Life & Fire Ins. Co., 37 U. S.; 12 Pet., 140.

Todd vs. Daniel, 41 U. S.; 16 Pet., 521.
Smith vs. Strader, 12 How., 327.
Davenport vs. Fletcher, 16 How., 142.
Mussina vs. Cavazos, 20 How., 280.
Clifton vs. Sheldon, 23 How., 481.
Masterson vs. Herndon, 10 Wall., 416.
Hampton vs. Rouse, 13 Wall., 187.
Simpson vs. Greeley, 20 Wall., 152.
Fiebelman vs. Packard, 108 U. S., 14.

These views prohibiting any attempt at modifying or changing the record by addition thereto, or otherwise, after the time for the obtaining of jurisdiction has passed, and after the time the citation calls for the appellees to appear, found a full expression by the Supreme Court of the United States in adopting the views heretofore reached in the case of

Hardee vs. Wilson, 146 U. S., 183-5.

where it is held:

"The plaintiff in error moves to amend the writ by adding the immediate parties as complainants, or for a severance, and it is held that the motion must be denied, and the writ of error be dismissed." Following

Mason vs. U. S., 136 U. S., 581.

But to conclude on this branch, should the Court be inclined to think all these views not well taken, it still could not allow such an amendment, because the statute of limitations of such an appeal has run.

See Brief under the second point, and Transcript heretofore cited.
Estis vs. Trabue, 128 U. S., 225.
Wilson vs. Insurance Co., 12 Peters, 140.

But should all the views here urged be held against the appellees, still we invite the court's attention to the fact that with the amendment allowed after this expiration of time with Andrew F. Burleigh as a party brought into the cause, still you have the apparent omission and the unaccounted for absence of

1. The Northern Pacific Railroad Company.
2. The *et als.* heretofore referred to.
3. The Seattle, Lake Shore & Eastern Railway Company.

It is evident to the court that the second mortgage bondholders by their trustee, who are in the cause seeking the foreclosure, are persons represented by the *et als.* They have a right to insist that this decree be affirmed or that it be reversed, and they should be heard and determined now, once and for all time. We insist that no amendment or modification could possibly be had without a great injustice to appellees; for if the amendment is to one now, why not in a month from now to another, and in another month to a second, and in another month possibly to a third?

We respectfully urge that this attempted modification be denied, the offer of amendment in any form be refused, that any attempt to add to the transcript as certified by the clerk be held to be without authority and not under the proper exemplification.

Again we submit these suggestions with respect,

JAMES HAMILTON LEWIS,
Solicitor for Appellees.

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
Of Counsel.

No. 288.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

PETITION FOR REHEARING.

JOHN B. ALLEN AND
E. C. HUGHES,
Counsel for Appellant.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors and of Counsel.

OWMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*, vs. PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*	No. 288.

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

PETITION FOR REHEARING.

To the Honorable Judges of said Court:

Now comes the Farmers' Loan & Trust Company, the appellant in the above entitled cause, and respectfully shows to your Honors as follows:

On the 19th day of October, 1896, this court filed its opinion in the above entitled cause, wherein it held that the motion of appellees to dismiss this appeal should be sustained, the *sole* ground therefor given in the opinion of this court being that the Northern Pacific Railroad

Company was a party to the final order made in the Circuit Court on the 18th of December, 1895, and interested therein, and that said company did not join in the appeal, and was not served with the citation and has not entered in this court its appearance and consent to said appeal. The appellant respectfully petitions this court to vacate the order of dismissal of the appeal, to grant a re-hearing of said motion to dismiss, and to reinstate and restore to the docket said cause for hearing and determination upon its merits. This petition is based upon the following grounds:

I.

The Northern Pacific Railroad Company did in fact enter its appearance in this appellate court and consent to this appeal. Its appearance was filed in this court on the 21st day of May, 1896, and is in the following language:

"IN THE UNITED STATES CIRCUIT COURT
"OF APPEALS FOR THE NINTH CIRCUIT.

"THE FARMERS' LOAN AND TRUST COMPANY, *Appellant*, vs. "PETER G. LONGWORTH, MICHAEL RASKEY and ANNIE RASKEY, his wife, "and RICHARD A. BELLINGER, *Appellees.*	No. 288. Appearance

"Comes now the Northern Pacific Railroad Company, "defendant, by E. M. Carr and Harold Preston, its

"counsel, and hereby appears in the above entitled ap-
"peal in the above named court, and consents to the
"appeal of said matter by The Farmers' Loan and
"Trust Company as above made and contained.

"E. M. CARR AND HAROLD PRESTON.
"*Attorney for said Defendant.*"

This court in its opinion notices the fact of the appearance of Andrew F. Burleigh, the Receiver, but overlooks the appearance of the Railroad Company. This is doubtless due to the fact that the same mistake was made in the brief of appellees in support of their motion to dismiss. This motion and brief were made and filed too late for appellant to file an answering brief and the statement contained in the brief of appellees in support of their motion must have been taken by the court to be true. Being thus misled in respect to what this court appears to have deemed an essential fact, we believe it will make haste to correct this inadvertence by granting a re-hearing and restoring the case to the docket.

II.

It is also stated as a fact in the opinion of this court in this case that "after the appeal was perfected in this ,, court, and after a motion had been filed by the "appellees to dismiss the same, the receiver, by his "attorney, entered in this court his appearance and "consent to the appeal." We think that the entry of appearance and consent by said receiver was filed in this court on the 21st day of May, 1896, and that the entry of appearance and consent by the Northern Pacific Railroad Company, by its attorneys, Messrs. Carr &

Preston, above referred to, was filed in this court ON THE SAME DAY. The brief of the appellant was also filed the same day. The motion of the appellees to dismiss this appeal was served on the appellant on the 5th day of June, 1896, more than two weeks after the entry of appearance and consent to the appeal by said receiver, and the Northern Pacific Railroad Company. We think that by reference to the original papers on file in this court the foregoing statement of facts will be found accurate. All of these steps were taken before the expiration of the statutory time of six months allowed for appeal. It is easy to see how this court was led into a misconception of the facts, when the appellees in their motion to dismiss the appeal (See Appellees' Brief, pp. 2 and 3) which was filed after Appellant's Brief and said appearance and consent of said Receiver and said Northern Pacific Railroad Company were filed, stated that "Andrew F. Burleigh, Receiver, "and the Northern Pacific Railroad Company * * * "have not joined in this appeal or severed from it by "summons and severance, or have had any notice what-"ever by citation or otherwise, of the appeal herein," when in point of fact at the time of this motion the voluntary appearance and consent of these parties were on file in this court.

We earnestly contend that the voluntary appearance and consent to appeal by the Receiver and said Northern Pacific Railroad Company as above stated, were sufficient to confer jurisdiction upon this court to entertain this appeal.

In the case of *Buckingham v. McLean*, decided by the

Supreme Court of the United States, reported in 13th Howard *151, the court say:

"The object of a citation on a writ of error or "an appeal is to give notice of the removal of the "cause, and such notice may be waived by entering a "general appearance by counsel. Where an appear- "ance is entered, the objection that notice has not been "given is a mere technicality, and the party availing "himself of it should, at the first term he appears, give "notice of the motion to dismiss, and that his appear- "ance is entered for that purpose."

In this case no special appearance whatever was entered.

In the case of *Bigler v. Waller*, decided by the Supreme Court of the United States, reported in 12th Wallace, pp. 142, 147, the court say:

"Undoubtedly the citation is irregular, as it should "be addressed to the actual parties to the suit at the "time the appeal was allowed and prosecuted. Where "a party dies before the appeal is allowed and prose- "cuted, the suit should be revived in the subordinate "court, and the citation, as matter of course, should be "addressed to the proper party in the record at that "time. Notice is required by law, and where none is "given and the failure to comply with the requirement "is not waived, the appeal or writ of error must be dis- "missed, but the defect may be waived in various ways, "*as by consent or appearance* or the fraud of the other "party."

In the case of *Dayton v. Lash, 94 U. S., p. 112*, the court say:

"We cannot proceed to hear and determine the cause "until the parties are here, either constructively by "service *or in fact by their appearance.*"

The case of *Pierce v. Cox*, *9 Wallace*, *p. 786*, was a case of two motions to dismiss an appeal from the Supreme Court of the District of Columbia; one of the motions being made by the appellant on the ground that no citation had been issued according to law, and the other by the appellee because the amount in controversy was not of sufficient value, and because there was no evidence in the record of an allowance of the appeal. Chief Justice Chase, in delivering the opinion of the court, said:

"The motion on the part of the appellant to dismiss "the appeal, on the ground that no citation was issued "according to law, cannot be sustained. The appellee "is in court represented by counsel, and makes no ob- "jection to the want of citation. By this appearance "the citation is waived so far as the appellee is con- "cerned, and the appellant cannot be heard to object to "the want of citation occasioned by her own negligence, "and cured by voluntary appearance. But the motion "of the appellee must be granted on both the grounds "presented."

We propose to present in another part of this petition additional argument to show that by the filing of this voluntary appearance by the Northern Pacific Railroad Company the court acquired jurisdiction of all the parties necessary to the appeal, and that the Northern Pacific Railroad Company is concluded by any judgment that may be rendered by this court upon this appeal.

III.

We do not dispute the legal propositions laid down by the court in its opinion. We simply contend that they are not applicable to this case for the reason that the court misapprehended the facts.

Assuming for the present that the Railroad Company was a necessary party to this appeal, the only question to be here considered is whether it is before this court so as to be bound thereby. It did not join in the petition for the allowance of the appeal; it was not brought before the court below upon the petition for the allowance of the appeal by summons, nor was there any order of severance made; it was not served with the original citation on appeal. It has, however, entered its appearance and consent to this appeal in this court. By so doing, it has manifestly bound itself by whatever judgment shall be entered here and has estopped itself from taking any other or further appeals from the judgment or order of the court below. The fact that one of the parties jointly bound by a decree would not be so concluded by the appeal has been the essential reason always given by the Supreme Court for sustaining a motion to dismiss an appeal to which such party was not joined and by which it would not be bound. In the leading case of *Masterson v. Herndon*, *10 Wallace*, *416*, quoted by this court, and cited in all the cases decided by the Supreme Court in which this question was involved, it was said by Justice Miller: "In chancery "cases, all the parties against whom a joint decree is "rendered must join in the appeal, or they will be dis- "missed. There are two reasons for this: 1. That the "successful party may be at liberty to proceed in the

"enforcement of his judgment or decree against the par-
"ties who do not desire to have it reviewed. 2. That
"the appellate tribunal shall not be required to decide a
"second or third time the same question on the same
"record. * * * We do not attach importance to the
"technical mode of proceeding called summons and
"severance."

In respect to the first of these reasons, it may be said that the order was one which could not have been enforced against the Railroad Company. Moreover, the order was stayed by the supersedeas bond given by appellant.

As to the second of the reasons above assigned, it is patent that the Railroad Company having entered in this court its appearance and consent to the appeal would be estopped from taking any further appeal to this court from the order of the Circuit Court.

It would certainly work as complete an estoppel as would mere notice to it of appellant's intention to take this appeal, or the proceedings by summons and severance, which appear by the opinions of the court to be deemed sufficient. Upon this question of estoppel, Justice Miller says in the above cause: "The latter
"point is one to which this court has always attached
"much importance."

In the statement of the case of *Sipperley v. Smith, 155 U. S., 86*, cited in the opinion of this court in this case, it is said: "No application for summons and severance
"as to M. J. Gray or any equivalent therefor appeared
"in the record, nor any order permitting severance; nor
"was any application made in this court for the issue of

"citation to A. F. Sipperley and H. S. Lee, or leave to "perfect the appeal as to them; *nor did they or Gray* "*appear herein.*"

Upon this state of facts, the court granted the motion to dismiss in that case. In this case, however, the Railroad Company is before this court and by its own action is bound by the appeal. The Supreme Court of the United States appears to have gone much further in the case of *Inland & Seaboard Coasting Co. v. Tolson, 136 U. S., 572.*

IV.

The Northern Pacific Railroad Company was not bound by the order from which this appeal was taken and was therefore not a necessary party to this appeal.

The attention of this court was evidently not called to the state of the record in this case in the above particular. This was not due to the fault or omission of court or counsel, but rather of the rule which gives no opportunity for the filing of reply briefs. An examination of the transcript and printed record in this case will disclose the following facts: An order was made in this cause, properly entitled and numbered, bearing date August 16, 1894, directing the receivers then duly appointed and acting in said court to pay to Peter G. Longworth, Richard A. Bellinger and Michael Raskey the amounts of certain alleged judgments in their favor, or deposit with the clerk of the Circuit Court certificates for said amounts. This order was made *ex parte.* (Printed Record, p. 5.)

The only pleadings and proceedings upon which this order appears to have been based were the following: First, a notice in the following language:

"IN THE UNITED STATES CIRCUIT COURT,

"NORTHERN DIVISION.

"IN THE MATTER OF THE RECEIVERSHIP
"OF THE SEATTLE LAKE SHORE RAIL-
"ROAD COMPANY AND
"PETER G. LONGWORTH, ET AL.,
Petitioners,

VS.

"THE NORTHERN PACIFIC RAILROAD COM-
"PANY ET AL., *Defendants.*

"NOTICE.

"To the Defendants, the Seattle, Lake Shore and "Eastern Railroad Company, the Northern Pacific "Railroad Company, Henry Ives, Henry Rouse and "H. C. Payne, Receivers, and to Andrew F. Burleigh, "their attorney:

"You and each of you will please take notice that the "petitions in the above named causes, will be called up "for hearing and determination before the Hon. C. H. "Hanford, Judge of the above entitled court, at his "courtroom in the Colman Block, Seattle, King County, "at the hour of ten o'clock A. M. of the 10th day of "August, or as soon thereafter as counsel can be heard.

"JAMES HAMILTON LEWIS,
"*Attorney for Petitioners.*"

Second. A petition, entitled:

"IN THE UNITED STATES CIRCUIT COURT,
"NORTHERN DIVISION, HOLDING COURT AT SEATTLE.

"PETER G. LONGWORTH, RICHARD A. BELLINGER and MICHAEL RASKEY,
Petitioners,
vs.
"THE NORTHERN PACIFIC RAILROAD COMPANY, HENRY IVES, HENRY ROUSE and H. C. PAYNE, Receivers, *Respondents*.

This petition sets forth that the petitioners had theretofore obtained separate judgments against the Northern Pacific Railroad Company. It implies without so stating that a receiver had been appointed for that company and without indicating by what court such receiver was appointed, or in what proceeding. It alleges that the reports of the company and the said receivers show that there is a balance of the earnings in excess of a sum sufficient to defray all expenses of the operation of the road, and it prays that the receivers audit and pay these judgments, and that in default petitioners be permitted to issue execution against the property of the Northern Pacific Railroad Company. (Printed Record, pages 2-5.)

Third. An admission of service of notice signed by A. F. Burleigh as attorney for "*the Seattle, Lake Shore & Eastern Railway Company*," an entirely independent company and having an entirely distinct receivership in no wise connected with the appeal now before this court or the order or judgment from which this appeal is taken, or the cause in which it is entitled.

It will be seen, therefore, that the jurisdiction of the court below was never invoked in any proceeding instituted in accordance with the practice governing either legal or equitable proceedings. There was no original action commenced, no original process served; there was no petition for leave to intervene nor any order granting such leave in any case then pending before the Circuit Court. By their petition, however, they did succeed in invoking the action of that court and obtaining from it an order directing its receiver in a proceeding then regularly pending in said court in which The Farmers' Loan and Trust Company was plaintiff and the Northern Pacific Railroad Company was defendant, being cause No. 337, to pay out of the funds then held *in custodia legis* and involved in that controversy certain judgments asserted by the petitioners; or to issue certificates redeemable in cash in six months and bearing interest at eight per cent per annum.

When this appellant, the plaintiff in said cause No. 337, learned that funds in controversy in said action and upon which it asserted a mortgage lien were about to be paid out by the receiver in said cause No. 337, in pursuance of an *ex parte* order, which said receiver would have been compelled to obey, it moved the court for time in which to show cause why the said order should not be vacated or modified. (Printed Record, p. 6.) Subsequently, and by leave of court, it intervened in the foregoing proceeding, entitled "Peter G. Longworth, "Richard A. Bellinger and Michael Raskey, Petitioners "v. Henry Ives, Henry C. Rouse and H. C. Payne, Re-"spondents." In this intervention and answer to the petition of Longworth and others, this appellant sets

forth the facts showing its priority of right to the funds in the hands of the receivers and why the order directing the receivers to pay the demands of the petitioners granted upon their *ex parte* application should be vacated. Upon this intervention and the appellant's motion, the court refused to vacate the order made in favor of the petitioners, but did modify and in some respects enlarge it. The present appeal was taken. The first order made by the court was as to this appellant *coram non judice*. But for its intervention, the money in the hands of the receiver upon which appellant's lien operated would have been paid out and its lien destroyed. When appellant came into court, however, for the preservation of its rights and invoked the action of the court, it became bound by all orders made in the premises thereafter. The order of the court upon the motion and application of appellant having been adverse to it, it was compelled for the preservation of its rights to perfect this appeal.

But the Northern Pacific Railroad Company ~~has never been~~ was not brought into this proceeding. Each order of the court below set forth in the record in this case is as to it *coram non judice*.

The court, in its opinion, has treated the nondescript proceedings of the petitioners Longworth and others as an intervention. An intervention in what? They did not entitle their proceeding as one in the cause of The Farmers' Loan and Trust Company v. Northern Pacific Railroad Company *et al.*, No. 337. That was an action in equity for the foreclosure of a mortgage in which the parties defendant had been regularly brought before the court by process of subpœna to answer the issues ten-

dered by the bill of complaint and those only; and not only was the proceeding of petitioners not entitled in that case, but no process therein, or in any other proceeding was issued or served calling upon the Northern Pacific Railroad Company, or this appellant, to answer the allegations of their petition. If their petition is to be treated as an intervention, notwithstanding it is not so denominated and no leave to intervene was ever granted, still as a distinct demand was made foreign to and inconsistent with the facts alleged and relief demanded in the bill of complaint of the appellant, proper process should have been served upon all the parties to that action before any order or decree could be entered binding any of them, or concluding their rights.

Foster's Federal Practice (2d Ed.), Sec. 202;
Beach's Modern Equity Practice, Sec. 569;
Daniell's Chancery Practice, 5th Ed., Sec. 1606–7;
11 New Jersey Equity, 29.

The receiver, on the other hand, was the mere arm of the court. Therefore, when he was ordered to take the property of the defendant Railroad Company and which was subject to the lien of this appellant, it was not his to inquire nor to resist. He had but to obey; and except for the timely discovery of this appellant, the money constituting a part of the trust in the hands of the receiver would have been erroneously and improvidently diverted from the proper objects and purposes of that trust. Before the final order was entered from which this appeal was taken and from which alone this appellant could have appealed, Andrew F. Burleigh had become the receiver of this court in the discharge of that

trust and therefore the order in question, unlike the original order, is addressed to him as the court's then existing receiver. He has likewise entered his appearance in this cause, though that would seem to have been wholly unnecessary.

The grounds upon which this court has based its decision are expressed in the following language, quoted from its opinion:

"Applying the doctrine of these decisions to the case "before the court, it is apparent that the Northern "Pacific Railroad Company was a necessary party to "this appeal. It is true, that the answer of the Farmers' "Loan & Trust Company to the intervention of the "petitioners alleges that the Northern Pacific Railroad "Company is insolvent, and that its property is inade- "quate to meet the mortgage liens; but this fact does "not alter the rule, nor dispose of the rights of the "railroad company. The judgments have been estab- "lished against the railroad company, and it could not "be heard to contest its liability upon the same; but "it had the right to be heard upon the question of "the payment of the judgments in preference to "the payment of the mortgage liens. Concerning "that controversy it is one of the real parties in "interest. By the law of Washington the judg- "ments bear interest at eight per cent. per an- "num, and the order of the court directing their pay- "ment by the receiver provided that he should either "pay the amounts due or deposit with the clerk receiv- "ers' certificates for the respective amounts, bearing "interest at eight per cent. per annum until paid. The "mortgages bear interest at five and six per cent. The

"question of the disposition of the funds in the receiv-
"ers' hands, the payment of one lien or class of liens
"bearing one rate of interest to the exclusion or post-
"ponement of another class bearing a different rate of
"interest is one which affects the substantial right of
"the Railroad Company and upon which it is entitled
"to be heard. The motion to dismiss must be allowed."

As we have pointed out from the record, the assumption that the Northern Pacific Railway Company is a necessary party to this appeal is erroneous, not having been a party to the orders of the court below, it could not be a necessary party to this appeal.

We therefore respectfully submit that a rehearing should be granted, the motion to dismiss denied and the appeal determined upon its merits.

JOHN B. ALLEN AND
E. C. HUGHES,
Counsel for Appellant.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors and of Counsel.

UNITED STATES OF AMERICA, }
STATE OF WASHINGTON. } SS.

I, E. C. Hughes, one of the solicitors in the above entitled cause, do hereby certify that the foregoing petition for re-hearing is in my judgment well-founded and that it is not interposed for delay.

E. C. HUGHES.

No._____

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

In Error to the Circuit Court of the United States for the District of Washington, Northern Division.

REPLY TO PETITION FOR REHEARING.

JAMES HAMILTON LEWIS,
Solicitor for Appellees.

STRATTON, LEWIS & GILMAN AND FREDERICK BAUSMAN,
Of Counsel.

HINMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*, VS. PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*	No.-----

In Error to the Circuit Court of the United States for the District of Washington, Northern Division.

REPLY TO PETITION FOR REHEARING.

To the Honorable Judges of said Court:

Appellees do not tender to the court this compilation as a reply to the petition for rehearing so much as they offer it as a *correction* of the statements made therein, as we deem it sufficient that the statements when corrected in point of fact make unnecessary further comment.

I.

Under point one on page two the appellant insists that the Northern Pacific Railroad Company by its counsel did appear in the said cause, and that such appearance is sufficient for the purpose of an appeal, and that such consent was made on the *21st day of May, 1896.* Counsel say: "*We think the same was filed on the 21st of May 1896.*"

This assertion disposes of the whole matter, for the truth is, as the court's opinion states it, that the assumed consent to jurisdiction by this court given by the Northern Pacific Railroad Company through their counsel was as a fact not filed in the Circuit Court of Appeals until a few days previous to the argument in the month of June, 1896.

Now, assuming that jurisdiction could be assented to by the Northern Pacific where the court has none confessedly without such consent, could such consent avail at the time it was given; it is apparent that the *appearance* and consent which the law allows at all is to the order of appeal as made in the lower court from which the appeal is taken; or, in the language of the books, in that court where severance is to be granted or to which citation issued.

Clearly the court observes that this was not only beyond the period allowed in the law for the time of citation —for the service of citation after the lower court had lost jurisdiction; *but under the statute of limitations the time for an appeal at all had absolutely expired by months.*

The recital in the court's opinion is not only so abso-

lutely correct as from the record but from the petition for rehearing is confessedly so.

We recall to the court that this phase was argued by counsel for appellant and for the appellees orally, and the facts gone over, and the effect of such an attempt to bolster up an omission and wrong, and authorities were cited, particularly one from a neighboring Circuit Court of Appeals, showing that just such an attempt was futile, as it was not an attempt to correct an omission; it was in the nature of an attempt to do a thing that had not been done within time. To do a thing to make good that which without having been done was of itself nothing.

The Circuit Court of Appeals, as was well stated by the decision read to the court, had no jurisdiction to allow appeals and severances. It was not the court from which the appeals were being taken, but the court to which the appeal had already been taken, and all power of the lower court disposed of and at end.

II.

THE APPELLANT ADMITS THE NORTHERN PACIFIC HAS NOT APPEALED.

On pages 2 and 3 of the petition for rehearing, and as is pointed out in the opinion in the record, what the attorneys for the Northern Pacific do is to consent *that the Farmers' Loan & Trust Company may appeal.*

Supposing they did not consent; would it have affected the right of this company to appeal with the proper severance and citation? Certainly not. Supposing the consent of the Northern Pacific had not been

sought at all; would it have mattered one way or the other as to the rights of the Farmers' Loan & Trust Company had they chosen to adopt a severance and serve the Northern Pacific? Assuming all this to have been done in time--supposing the Northern Pacific does consent to the Farmers' Loan & Trust Company appealing, can that add validity to the appeal if it is not properly taken? Can this make good that which is bad in the manner of taking the appeal? Can this consent give the court jurisdiction of the appeal of the Farmers' Loan & Trust Company if the same is not taken in the manner and the way the *law* prescribes in order that the court should obtain jurisdiction?

So admitting that there could be jurisdiction given for any purpose or that this "consent" as it is termed was filed in the lower court instead of the Court of Appeals, does it amount to any thing more than that as between it and the Farmers' Loan & Trust Company it makes no objection to that company appealing? Certainly not.

The Northern Pacific Railroad Company neither by its act or any other act has ever appealed or assumed to appeal, or renounced its intention to appeal, or announced its abiding by the decision; it merely consents to an appeal by one of the parties, reserving to itself the right to appeal itself should subsequent developments upon the Farmers' Loan & Trust Company's appeal not be gratifying to it, the company. This is all of the matter, and upon this statement of the situation uncontroverted, admitted on the record, the dismissal of the case is not only justifiable, but under the law inevitable.

III.

It is too well settled that in the lower court there must have been an appeal by the Northern Pacific Railroad Company, or a renouncement by it of any intention to appeal, and an announcement of its abiding by the decision, and if not this then the law has pointed out that there must be a severance in behalf of the Farmers' Loan & Trust Company, and an order made in the lower court to that effect, and that this is necessary to be so made in the lower court for the purpose of jurisdiction.

Keeping in view that this consent to the Loan Company to appeal in its own behalf for whatever benefit it may be seeking to itself was attempted to be made four months after the appellees appeared in the cause—four months after the cause had been on file in the Circuit Court of Appeals.

We still have that other proposition unmet in any wise that the law is:

(*a.*) Any summons or judgment of severance must be had in the circuit court from which the appeal is taken.

Todd vs. Daniel, 41 U. S. (16 Peters), 521.

(*b.*) *Any severance, therefore, must be had before the return day of the citation, and the writ of error.*

Bacon Abr., 268.

Blunt vs. Snedston, Cro. Jac. 117.

(*c.*) The defects of the parties plaintiff or defendant in error cannot be cured by an amendment.

Thompson vs. Crocker, 1 Salk. 49.

Walter vs. Stokoe, 1 Ld. Raym. 71.
The Protector, 11 Wall. 82.

Whatever privilege of amendment Section 1005 of the Revised Statutes of the United States would permit, it has never been held to permit anything more than the amendment of form.

Here the defect is that all the defendants do not join in the appeal, nor are they served, nor all of them cited, nor does there appear to be any severance. To ground an amendment here would be in violation of Section 1005 of the Revised Statutes.

It has therefore been expressly held by this court that the omission or defect of parties plaintiff or defendant in error is not and cannot be amended nor supplied after the time of the citation and after the cause has been appealed, as such must have existed and the severance must have been adjudicated previous to the issuance of the citation, in order that it may be ascertained who are to be cited.

Estis vs. Trahue, 128 U. S. 225.
Ex Parte Sawyer, 21 Wall. 235.

(*d.*) Therefore, it is held that where there is this substantial defect in the record which cannot be amended in this court, *this court has no jurisdiction.*

Wilson vs. Life Insurance Co., 12 Peters, 140.

It will then of its own motion dismiss the case without awaiting the action of any party, and will do this at any time before judgment.

Hilton vs. Dickinson, 108 U. S. 165.

For the court again asserts that *all the parties against whom a judgment is entered must join in a writ of error, or there must be a proper summons and severance.*

Williams vs. Bank of U. S., 24 U. S. (*11 Wheat.*) *414.*
Owings vs. Kincannon, *32 U. S.* (*7 Peters*), *399.*
Wilson vs. Life & Fire Ins. Co., *37 U. S.* (*12 Peters*), *140.*
Todd vs. Daniel, *41 U. S.* (*16 Pet.*), *521.*
Smyth vs. Strader, *12 How. 327.*
Davenport vs. Fletcher, *16 How. 142.*
Mussina vs. Cavazos, *20 How. 280.*
Clifton vs Sheldon, *23 How. 481.*
Masterson vs. Howard, *10 Wall. 416.*
Hampton vs. Rouse, *13 Wall. 187.*
Simpson vs. Greeley, *20 Wall. 152.*
Fiebelman vs. Packard, *108 U. S. 14.*

These views prohibiting any attempt at modifying or changing the record by addition thereto, or otherwise, after the time for the obtaining of jurisdiction has passed, and after the time the citation calls for the appellees to appear, found a full expression by the Supreme Court of the United States in adopting the views heretofore reached in the case of

Hardee vs. Wilson, *146 U. S. 183*,

where it is held:

"The plaintiff in error moves to amend the writ by adding the immediate parties as complainants, or for a severance, and it is held that the motion must be denied, and the writ of error dismissed."

Following—

Mason vs. U. S., 136 U. S. 581.

But to conclude on this branch,—should the court be inclined to think all these views not well taken, it still could not allow such an amendment, because the statute of limitations of such an appeal has run.

See our principal brief under this point and transcript therein cited.

Estis vs. Trabue, 128 U. S. 225.
Wilson vs. Insurance Co., 12 Peters, 140.

IV.

We again urge to the court that at no time has there been any appearance by the Northern Pacific Railroad Company in the Circuit Court of Appeals *for itself.* The only thing is they appear and limit their appearance to the purpose of consenting to the appeal by the Farmers' Loan & Trust Company *in the manner as made by them.*

Can any one contend that this case being disposed of against the Northern Pacific Railroad that appearance, assuming it to have been made jurisdictionally and to have been made in the lower court, could be urged against the Northern Pacific as an appearance to the merits of the general cause which can bind them on the record as being parties to the appeal?

The case of

Island and Seaboard Coasting Co. vs. Tolson, 136 U. S. 572,

was a motion made to amend under Section 1005 of the Revised Statutes, but that amendment was for the pur-

pose of adding new plaintiffs to the case, to-wit: being an action at law for damages, the motion was to amend the writ of error. This particular proceeding is limited and permitted by Section 1005 of the Revised Statutes, which by its very terms excludes such a privilege in equity causes, where the appeal goes up in the form of an appeal in equity; and if this were not so still

This case could have no bearing as there the motion was to make and take the original appeal.

Here in the case at bar no motion to add other parties is made at all.

Here no motion by the Northern Pacific Railroad Company or in its behalf is made at all.

Here no motion is yet made to amend and take appeal, or to be bound by the appeal through or by the Northern Pacific Railroad Company.

Nor can such or any of such motions be made because the statutes of limitation allowing the privilege of appeal or amendments have all expired months and months ago. Thus it will appear that at no time, in no way, by no process has the Northern Pacific in the past nor now made any appearance for itself in any court having jurisdiction of the appeal.

This disposes of the second point marked third in appellee's motion for rehearing.

V.

Referring to point four of the petition for rehearing, counsel now say that the Northern Pacific did not have to make an appearance, and therefore do not propose to be bound, and that they were not served and were not to the record.

This same matter was urged by learned counsel, Mr. Allen, in arguing the case, and was at once disposed of by calling his attention to facts. A short reference to those facts will suffice as a reminder to the court.

The notice addressed to the Seattle, Lake Shore & Eastern was but one of the different notices, and this was addressed to the company only in the Raskey case, because it was the Seattle, Lake Shore & Eastern Railroad Company which killed the child of the Raskeys, for which judgment was obtained.

The company was then under lease of the Northern Pacific. It had also gone into the hands of a special receiver in behalf of the stockholders, and that particular notice was addressed only in that case, the Northern Pacific still controlling its traffic and its receipts.

The Northern Pacific Railroad Company was also made a party because that was the company that had produced the injuries to Bellinger and Longworth, and all of these companies as one property were being operated by one set of receivers.

The notice to the Seattle, Lake Shore & Eastern was simply a separate notice out of an abundance of caution.

That all of these facts are completely borne out by the record as pointed out by the decision will again be apparent.

(*See Transcript, pp. 1 and 2.*)

That the Northern Pacific was a party cannot be denied now in view of the fact that they were made so both by the order of the court and their voluntary appearance in the lower court to combat that order. That

they were made a party by the order itself made by the court is seen from

(*Transcript, p. 5.*)

That the Farmers' Loan & Trust Company complained that only the Northern Pacific had notice and not themselves as one of the grounds for being specially heard is apparent from

(*Transcript, pp. 6 and 8.*)

Also of their own motion and notice to vacate the order.

(*See Transcript, pp. 10 and 11.*)

Also the order of the court denying such motion.

(*Transcript, pp. 12 and 13.*)

But aside from all this it is familiar law that, as this record discloses, the Northern Pacific Railroad Company came before the court, sought the receiver, had itself put into the hands of a receiver, was a party to the record in the appointment of the receiver, and continued to be a party to all the record and all the proceedings. If there could possibly be any doubt upon this proposition at this time in view of this whole record it is certainly set at rest by

McLeod vs. Albany, 13 C. C. A. 527 (*66 Fed. 378,*) in which it is said: "The other parties (the New Albany Railroad) whose presence is suggested as essential, are parties to the original appeal as holding * * * property subordinate to the lien of complainant. They were in court in the suit in which the receivers were appointed and were *bound to take notice of the interven-*

ing petitions * * * filed in that suit and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. *Being parties to the suit they were in fact parties to the intervening petitions.*"

And subsequently this same view is held in an opinion by the Chief Justice of the Supreme Court of the United States presiding at circuit in

Trust Co. vs. Madden, 70 Fed. Rep. 453,

in which it is said: "It is objected by appellant that the Central Trust Company should have been a party to the intervention, but that company was complainant in one of the suits, and bound to take notice of the intervention and proceedings thereunder. McLeod vs. City of New Albany, 13 C. C. A. 525, 66 Fed. 378. If the mortgagee, as observed by Jenkins, J., speaking for the Circuit Court of Appeals in that case, had desired to take an active part in this contest, it should have asked to be heard. This it did not do, nor did it take any means to procure a hearing, or bring to the attention of the circuit court any matters tending to show that such a decree as was rendered was unjust or erroneous in any other particulars than those which could be reviewed on this appeal."

But as this is text law and sustained by the very decisions cited by appellant in their motion to review, and particularly the dissertation of

Foster, Sec. 202;
Beach Equity Practice, Sec. 569–70,

it can hardly require further comment.

VI.

We have to observe, lastly, that aside from the inaccuracies, the mistakes, and the misstatements in point of fact respecting dates and the record made in the petition for rehearing, that should everything in the petition for rehearing be admitted as true, the appellants but disclose a want of parties in the appeal who should be bound by the judgment, and that the time has lapsed by which any error could be corrected, if it were an error in the lower court, or the upper court in any wise obtains jurisdiction of the subject-matter. And we call the court's attention to a parallel situation from the Circuit Court of Appeals in the case of

Threadgill vs. Platt, 71 Fed. Rep. 1,

in which the court has occasion to say, repeating the doctrines of Mussina vs. Cavazos, 6 Wall, and other cases following it: "The United States Circuit Court of Appeals has no jurisdiction in any case where more than six months intervene between the entry of the judgment and the day in which it is sought to maintain the writ of error, or from the time it is sued out; * * * and if the writ is allowed within the time, but yet it is not actually issued and filed in the manner the law requires until the expiration of the time, it will be dismissed, because it is essential that these jurisdictional papers be filed in the lower court."

And this rule has been laid down in reference to papers that are necessary to be filed, in the late Phinney decision.

It is also sustained as a doctrine of the law in

Scarborough vs. Pargoud, 108 U. S. 567.

And this court has too often held to be longer a subject of controversy, that no appearance or consent in this appellate court can give jurisdiction to a subject-matter or to a cause where the omission is an omission to do a thing that the law requires to have been done, or to file a paper that the law requires to have been filed in the *lower court;* but the court proceed to say: "These essential requirements cannot be waived or their waiver consented to by the parties."

Stevens vs. Clark, 10 C. C. A. 379.

Wisely, then, says the main case, that all of these steps must be taken, and taken in the lower court where the law requires they should be taken, to give the higher court jurisdiction; and the failure to take those steps cannot be remedied by an attempt of one of the persons to say "We will waive our rights if you will permit the other to benefit by a wrong or an omission of duty."

Brooks vs. Norris, 11 How. 204.
U. S. vs. Baxter, 2 C. C. A. 410.
Threadgill vs. Platt, 71 Fed. 3.

We submit these corrections merely to aid the court as an index to the record, should it desire any further reference than its opinion.

Respectfully submitted,

JAMES HAMILTON LEWIS,
Solicitor for Appellees.

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
Of Counsel.